(13)

No. 00-957-CSY Title: Kansas, Petitioner
v.
Michael T. Crane

Docketed: December 12, 2000 Court: Supreme Court of Kansas

Entry	Date	Proceedings and Orders
	Dec 12 2000	Petition for writ of certiorari filed. (Response due January 11, 2001)
	Jan 11 2001	Brief of respondent Michael T. Crane in opposition filed.
	Jan 11 2001	Motion of respondent for leave to proceed in forma pauperis filed.
	Jan 11 2001	Brief amici curiae of Missouri, et al. filed. VIDED.
	Feb 21 2001	DISTRIBUTED for Conference of March 16, 2001
	Mar 19 2001	REDISTRIBUTED for Conference of March 23, 2001
	Mar 26 2001	REDISTRIBUTED for Conference of March 30, 2001
	Apr 2 2001	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Apr 2 2001	Petition GRANTED. SET FOR ARGUMENT October 30, 2001. **********
	Apr 10 2001	Blanket consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
	Apr 16 2001	Blanket consent to the filing of amicus briefs in support of either party received from counsel for the respondent
	May 1 2001	Order extending time to file the joint appendix and petitioner's brief on the merits to and including June 15, 2001.
	May 15 2001	Order extending time to file respondent's brief on the merits to and including August 2, 2001.
	Jun 14 2001	Brief amicus curiae of Association for the Treatment of Sexual Abusers filed.
	Jun 15 2001	Brief of petitioner Kansas filed.
	Jun 15 2001	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Jun 15 2001	Joint appendix filed.
	Jun 15 2001	Brief amici curiae of Illinois, et al. filed.
	Jul 26 2001	Brief of respondent Michael T. Crane filed.
	Jul 31 2001	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Aug 1 2001	Brief amici curiae of American Psychiatric Association, et al. filed.
	Aug 14 2001	CIRCULATED.
	Aug 27 2001	Reply brief of petitioner Kansas filed.
	Sep 4 2001	Record filed.
	Oct 30 2001	ARGUED.

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Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

IN THE MATTER OF THE CARE AND TREATMENT
OF MICHAEL T. CRANE,

STATE OF KANSAS,

Petitioner,

v.

MICHAEL T. CRANE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kansas

PETITION FOR A WRIT OF CERTIORARI

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45 pp

QUESTION PRESENTED

Whether the Fourteenth Amendment's Due Process Clause requires a State to prove that a sexually violent predator "cannot control" his criminal sexual behavior before the State can civilly commit him for residential care and treatment?

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OPINION BELOW

The July 14, 2000, decision of the Kansas Supreme Court is reported at 269 Kan. 578, 7 P.3d 285, and is included in the petition appendix.

JURISDICTION

This Court's jurisdiction to review the final judgment of the Kansas Supreme Court is invoked pursuant to 28 U.S.C. § 1257(a). The Kansas Supreme Court issued its decision in this case on July 14, 2000. Kansas filed a timely petition for reconsideration which that court denied on September 26, 2000. This petition has been filed within ninety days of that date, as required by Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The "Due Process Clause" of the Fourteenth Amendment provides that

> "nor shall any State deprive any person of . . . liberty . . . without due process of law . . . ."

U.S. Const. amend. XIV.

The Kansas Sexually Violent Predator Act ("KSVPA" or "Act") defines a "sexually violent predator" as

> "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence."

Kan. Stat. Ann. 1999 Supp. § 59-29a02(a).

The Act defines "mental abnormality" as

> "a . . . condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others."

Kan. Stat. Ann. 1999 Supp. § 59-29a02(b).

Lastly, the KSVPA declares the phrase "likely to engage in repeat acts of sexual violence" to

> "mean[] that the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others."

Kan. Stat. Ann. 1999 Supp. § 59-29a02(c).

STATEMENT

1. *Nature of the Suit.*

This case is an involuntary civil commitment proceeding against Michael Crane under the Kansas Sexually Violent Predator Act. Kan. Stat. Ann. § 59-29a01 *et seq.* Crane has prior convictions for lewd and lascivious behavior (exposing himself to a tanning salon attendant) and aggravated sexual battery (physically attacking a video store clerk, attempting to force her to perform oral sex, and threatening to rape her), arising from two separate incidents. Pet. App. 2a-3a. This civil commitment proceeding was initiated near the end of Crane's sentence on the latter charge. *Id.* at 3a. Ultimately, the trial court ordered Crane committed to a state facility for residential care and treatment. Crane appealed to the Kansas Supreme Court, which reversed the trial court on the constitutional ground presented for review in this petition.

2. *The Trial Court Proceedings.*

In the trial court, Crane argued that he could not be committed constitutionally absent a showing that he was totally unable to control his criminal sexual behavior. Pet. App. 22a-23a. The trial court rejected his constitutional claim as follows:

> The Court finds the commission of a sexual crime and the existence of a mental abnormality or personality disorder which makes the person likely to engage in future predatory acts of violence are separate concepts and not interdependent upon one another in the sexually violent predator context. The Court denies Respondent's Motion for Summary Judgment stating as a matter of law that Respondent misinterprets the holding of Kansas v. Hendricks, by arguing the State must prove the existence of a mental disorder that so impairs the volitional control of Respondent as to render him unable to control his dangerous behavior. The Court holds the State must only prove the existence of a mental disorder that makes Respondent likely to reoffend.

Id. 23a (internal citations omitted).

In the trial court, "the State presented evidence of Crane's inappropriate sexual behavior on several occasions as well as the testimony of mental health professionals." Pet. App. 3a. Psychologists testified that Crane suffers from antisocial personality disorder and exhibitionism, with increasing frequency and intensity of his criminal sexual behavior. *Id.* Thus, the State proved both that Crane suffers from a personality disorder or mental abnormality and that he is likely to reoffend if he does not undergo further treatment. The State did not prove that Crane has a total lack of control over his criminal sexual behavior.

3. *The Kansas Supreme Court.*

The Kansas Supreme Court began its discussion of the merits by stating that

> [T]he controlling issue is whether it is constitutionally permissible to commit Crane as a sexual predator absent a showing that he was unable to control his dangerous behavior. To answer that question, we must revisit *Kansas v. Hendricks*, 521 U.S. 346 (1997).

Pet. App. 5a. The court then opined that "[t]he majority opinion, written by Justice Thomas, controls the result in this case." *Id.*

Looking at the majority opinion in *Hendricks*, the Kansas Supreme Court declared that Justice Thomas's opinion "is replete with references to the commitment of persons who cannot control their own behavior." Pet. App. 6a. The Kansas court then quoted extensively from that opinion, highlighting references to mental disorders that make it "'*difficult, if not impossible, for the person to control his dangerous behavior*'", "'criteria relating to *an individual's inability to control his dangerousness*'", and "'*admitted lack of volitional control*.'" *Id.* at 7a-8a (quoting *Hendricks*, 521 U.S. at 358, 360).

The Kansas Supreme Court then turned to the Kansas Act. The court observed that the Kansas law "does not expressly prohibit confinement absent a finding of uncontrollable dangerousness. In fact, a fair reading of the statute gives the opposite impression." Pet. App. 8a. Noting that the Kansas Act permits commitment when a sex offender's mental abnormality affects "either emotional capacity or volitional capacity," *id.* at 9a, the Court concluded that "the result of the legislature's identifying emotional capacity as well as volitional capacity in the definition of mental abnormality was to include a source of bad behavior other than inability to control behavior." *Id.* The Court further noted that nothing in the Kansas law suggests a requirement that the State prove inability to control behavior when the person's diagnosis is for personality disorder rather than mental abnormality. *Id.*

Thus, concluding that state law does not require proof of inability to control behavior in this context, the Kansas court then turned to Crane's constitutional argument and this Court's decision in *Hendricks*. First, the Kansas court opined that

> *[i]n contrast to this court's* [the Kansas Supreme Court's] *focus on the Act's constitutionality, the Supreme Court's opinion* [in *Hendricks*] *seems to be much more specific to application of the Act to Hendricks*. The particular facts of Hendricks' case, including his conceding that he cannot control his urge to sexually molest children, was at the core of the Supreme Court's opinion.

Pet. App. 10a (emphasis added). Second, the Kansas Supreme asserted that

> [a] fair reading of the majority opinion in *Hendricks* leads us to the inescapable conclusion that commitment under the Act is unconstitutional absent a finding that the defendant cannot control his dangerous behavior. To conclude otherwise would require that we ignore the plain language of the majority opinion in *Hendricks*.

Pet. App. 11a. The Kansas court then once again pointed to language in Justice Thomas's opinion, specifically references to those "'who suffer from a volitional impairment rendering them dangerous beyond their control'", and a mental abnormality or personality disorder that "'makes it difficult, if not impossible,' to control such behavior." *Id.* (quoting *Hendricks*, 521 U.S. at 358).

The Kansas court then opined that, "[h]owever, in the present case, Crane suffers from a 'personality disorder,' which by definition does not include a volitional impairment." Pet. App. 11a-12a. Thus, the Court reversed the commitment order because the jury was not instructed that it had to find Crane had an "inability to control his behavior." *Id.* at 12a.

REASONS FOR GRANTING THE WRIT

In 1997, this Court upheld the Kansas Sexually Violent Predator Act, Kan. Stat. Ann. § 59-29a01 *et seq.*, against several constitutional challenges. *See Kansas v. Hendricks*, 521 U.S. 346 (1997). Importantly, the Court expressly held that the Act's premises for involuntary civil commitment of certain sex offenders—proof of (1) a "mental abnormality" or personality disorder and (2) dangerousness linked to that mental problem—satisfied substantive due process requirements. *Id.* at 356-60.

Unfortunately, this Court's decision in *Kansas v. Hendricks*, 521 U.S. 346, apparently has not settled all substantive due process challenges to state sexual predator laws, which are involuntary civil commitment acts addressing dangerous, repeat sex offenders. Indeed, after *Hendricks*, sex offenders have argued that this Court created a new substantive due process requirement that the State prove that a particular sex offender has an "utter" or "total" "inability to control his criminal sexual behavior before commitment is permissible. In a related vein, sex offenders subject to these laws also have argued that a personality disorder diagnosis (some of which involve impaired emotional rather than volitional capacity) is an insufficient basis for civil commitment.

In *Kansas v. Hendricks*, Mr. Hendricks suffered from a recognized mental disorder (pedophilia)—not a personality disorder—and Kansas had obtained his commitment on the basis of the statutory provision regarding "mental abnormality", the definition of which expressly includes lack of volitional or emotional capacity. Moreover, as noted in both the majority and dissenting opinions, Hendricks himself, with a 40-year history of pedophilia, admitted that he was unable to control his criminal sexual impulses. *See, e.g.*, 521 U.S. at 360 (majority opinion of Thomas, J.); *id.* at 375-76 (dissenting opinion of Breyer, J.). Nowhere in those opinions, however, does any member of the Court expressly purport to create a new rule of substantive due process that requires the State to prove—as a prerequisite to involuntary civil commitment—that a sexually violent predator has an "utter" or "total" "inability to control" his criminal sexual behavior.

Nonetheless, whether federal substantive due process principles impose such a requirement has now divided the state courts, and the split of authority is deepening. The proper resolution of this issue is of great importance to the States because it will affect the application and effectiveness of numerous state sexually violent predator civil commitment

statutes now in existence, most of which were modeled after the Kansas law following this Court's decision in *Hendricks*. Indeed, the Kansas Supreme Court's holding in this case will effectively eliminate from the statute's reach any sex offender—regardless of past history and likelihood of reoffending—whose primary or sole diagnosis involves impaired emotional rather than volitional capacity. It also will affect those offenders whose diagnoses may involve impaired volitional capacity, but not total impairment. The issue is cleanly presented in this case and merits the Court's immediate attention.

I. WHETHER SUBSTANTIVE DUE PROCESS PRINCIPLES REQUIRE PROOF THAT A SEXUALLY VIOLENT PREDATOR IS UNABLE TO CONTROL HIS CRIMINAL SEXUAL BEHAVIOR IS AN ISSUE THAT HAS DIVIDED THE STATE COURTS.

1. The issue presented in this petition has divided the many state courts that now have considered it. In addition to the Kansas Supreme Court, state appellate courts in at least four other states have expressly addressed the substantive due process issue and have come to different conclusions.

In *In re Linehan*, 594 N.W.2d 867, 875-76 (Minn. 1999), *cert. denied sub nom. Linehan v. Minnesota*, 120 S. Ct. 587 (1999), the Minnesota Supreme Court addressed this issue at some length. Noting that the offender in that case was arguing for an "utter inability to control" requirement, 594 N.W.2d at 872, the court opined that

> [a]t no point in its analysis [in *Hendricks*] did the Supreme Court state that a civil commitment statute aimed at sexually dangerous persons could pass substantive due process without a volitional impairment element. Rather, the Court's reasoning establishes that *some* lack of

volitional control is necessary to narrow the scope of civil commitment statutes.

Id. at 873 (emphasis added).

The majority in *Linehan*, however, chastised the dissent in that case for

> unreasonably narrow[ing] the *Hendricks* holding by inserting the word 'totally' in front of the word 'control' whenever it refers to the Supreme Court's analysis of a person's ability to control his or her sexual impulses. In doing so, the dissent overstates the *Hendricks* holding. *Hendricks* states that a person may be civilly committed if he suffers from a mental abnormality or personality disorder 'that makes [it] difficult, if not impossible, for the person to control his dangerous behavior.' Clearly this language does not requie an utter lack of control over harmful behavior, but rather a lack of adequate control over harmful behavior.

Id. at 873 n.3. Thus, in Minnesota, based on statutory provisions that are indistinguishable from the Kansas law in all material respects, *id.* at 871 ("The language of the Kansas Act is very similar to the language of the Minnesota SDP Act"), the constitutional rule is that the State must prove lack of "adequate control", not that the sex offender "cannot control" his criminal sexual behavior.

To similar effect, see *In re Brooks*, 94 Wash. App. 716, 729, 973 P.2d 486, 492 (1999) (The *Hendricks* "Court did not require, as Mr. Brooks asserts, a showing of a total lack of control. Rather, the person's mental abnormality or personality disorder must make it 'difficult, if not impossible, for the person to control his dangerous behavior'"), *review granted on other issues*, 138 Wash. 2d 1021, 989 P.2d 1136 (1999).

Other state appellate courts have completely rejected an "inability to control" requirement and, instead, have concluded

that *Hendricks* recognizes only two substantive due process requirements: (1) dangerousness, *i.e.*, a likelihood of reoffending, linked to (2) a serious mental problem. In *In re Gordon*, 10 P.3d 500, 503 (Wash. App. 2000), for example, the Court concluded that

> [i]n its analysis, the Court [in *Hendricks*] made clear that civil commitment is appropriate only for individuals whose dangerousness is, to some significant degree, beyond their control, which is determined by linking the dangerousness to the presence of a particular condition, such as a mental abnormality.

10 P.3d at 502. The court observed that, "[l]ike the Kansas statute," Washington's statute "requires the State to prove . . . that a causal link exists between an alleged sexual predator's mental abnormality or personality disorder and the likelihood that he or she will engage in predatory acts of sexual violence in the future." *Id.* at 503. Thus, the Court concluded that the Washington law

> therefore meets the *Hendricks* Court's requirement that civil commitment not be predicated on dangerousness alone. Contrary to Gordon's assertion, *Hendricks* does not require a jury to make a specific finding that the mental abnormality or personality disorder makes it impossible, or at least difficult, for an individual to control his dangerous behavior.

Id. Similarly, in *In re Varner*, 315 Ill. App. 3d 626, 637-38, 734 N.E.2d 226, 235-36 (2000), the court rejected arguments that substantive due process requires the State to prove either that a sex offender "lacks volitional control over his sexual behavior" or that "it was difficult if not impossible for the [offender] to keep himself from offending again."

In *People v. Hatfield*, 80 Cal. Rptr. 268, 282 (1998), *modified* (Dec. 16, 1998), *and review denied and opinion ordered not to be officially published* (Mar. 17, 1999), the

California Court of Appeals strongly rejected the argument that the Kansas Supreme Court accepted in this case, declaring that

> [t]he essence of the due process requirement announced in *Hendricks* is a demonstrated, diagnosed impairment that makes the person likely to engage in dangerous sexually violent behavior in the future. It is the prediction of future dangerousness, whether due to inability to control behavior *or a compelled choice so to act*, that justifies civil commitment.

80 Cal. Rptr. at 282 (emphasis added). Thus, the court refused to impose any substantive due process requirements beyond proof of (1) dangerousness linked to (2) a significant mental problem.

The California Supreme Court appears to have endorsed the same position in *Hubbart v. Superior Court*, 19 Cal. 4th 1138, 969 P.2d 584 (1999). In *Hubbart*, the Court considered the case of a sex offender whose primary diagnosis was of antisocial personality disorder. The California Supreme Court rejected his argument that such a diagnosis was insufficient to satisfy substantive due process requirements. 969 P.2d at 593-99. The Court held that the California law—"which tracks the Kansas scheme verbatim", *id.* at 596—"establishes the requisite connection between impaired volitional control and the danger posed to the public." *Id.* at 597. In essence, the California Supreme Court, like the courts in *Gordon, Varner,* and *Hatfield,* concluded that *Hendricks* recognized only two substantive due process requirements: (1) dangerousness linked to (2) a significant mental problem, the latter of which can be satisfied by a diagnosis of mental abnormality or personality disorder. *Id.* at 593-601.

In contrast to these cases, the Kansas Supreme Court expressly held that proof of utter inability to control criminal sexual behavior is a constitutional requirement. Pet. App. 5a-12a. In so doing, that court was well aware of all the

foregoing decisions (except for *In re Gordon* and *in re Varner* decided in October and August of this year, respectively), and rejected the reasoning of these other courts. There is no way to reconcile or harmonize these decisions, and this important, deepening conflict of authority merits the Court's attention.

2. Imposing a constitutional requirement that the state must prove total lack of volitional control will inappropriately restrict the class of dangerous sex offenders subject to involuntary civil commitment for residential care and treatment. Many violent sex offenders have some ability to control their deviate sexual behavior; they simply choose not to, and in many cases those persons suffer from serious mental problems. The result of the Kansas Supreme Court's constitutional holding will be that many dangerous sex offenders who could benefit from intensive, residential therapy—indeed might be among those most likely to benefit—and who pose a significant danger to the public will simply have to be released from state custody without further treatment.

To the best of Kansas's knowledge, none of the state sex predator civil commitment statutes now in existence require proof that the person is totally unable to control his criminal sexual behavior. Moreover, to the best of Kansas's knowledge, a number of states with such statutes have committed sex offenders whose sole or primary diagnosis is of a personality disorder or antisocial personality. If other state supreme courts follow the Kansas Supreme Court, those commitments will be constitutionally impermissible and those dangerous offenders will have to be released without further treatment. Particularly because many states modeled their sex predator civil commitment statutes on the Kansas law after this Court's *Hendricks* decision, the States need guidance from this Court on the important issue raised here.

II. THIS COURT'S DECISION IN *KANSAS v. HENDRICKS* DID NOT CREATE A NEW "INABILITY TO CONTROL" REQUIREMENT.

The Court's precedents in the involuntary civil commitment context—including its only decision so far addressing sex predator laws, *Kansas v. Hendricks*, 521 U.S. 346 (1997)[1]—repeatedly recognize only two substantive due process requirements for justifying such restraints on liberty. First, there must be proof that the person is dangerous to himself or others. Second, that dangerousness must be linked to a significant mental problem. In *Hendricks*, eight Justices[2] held that the Kansas Sexually Violent Predator Act satisfied those two requirements. The division of opinion within the Court in *Hendricks* was over Hendricks's *ex post facto* challenge, not his substantive due process claims.

In *Hendricks*, neither the majority nor the dissent purported to make lack of volitional control a federal constitutional requirement. There are passing references in the majority opinion to a person's "inability to control" behavior, or "lack of adequate control", 521 U.S. at 357, 358, 362, 364, and in the dissent to "irresistible impulse." *Id.* at 375-76. But the Kansas statute at issue in *Hendricks* did not impose such a requirement, nor do other existing state sex predator statutes do so. Moreover, such a requirement does not fit within the Court's historical approach to determining substantive due process limits on involuntary restraint. Quarantine, for example, could not be justified on the ground that persons being quarantined for contagious diseases generally lack the ability to control their behavior. It was, of course, not surprising that the Court mentioned lack of volitional control in *Hendricks* since the sex offender at issue in that case, Mr.

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[1] The Court has granted review of and heard arguments in a second sex predator case, *Seling v. Young*, No. 99-1185 (argument on October 31, 2000).

[2] Justice Ginsburg does not appear to have joined either the majority or the dissenting opinion on the substantive due process issues in *Hendricks*. *See* 521 U.S. at 373.

Hendricks, had a primary diagnosis of pedophilia (a well-recognized mental disorder), a 40-year history of molesting children, and he admitted that he could not control his deviant impulses.

To the extent the Kansas Supreme Court held that a personality disorder, "by definition", can never never satisfy substantive due process requirements, Pet. App. 11a-12a, that court was simply wrong. The American Psychiatric Association recognizes that "no definition adequately specifies precise boundaries for the concept of 'mental disorder.' The concept of mental disorder, like many other concepts in medicine and science, lacks a consistent operational definition that covers all situations." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* at xxi (4th ed. 1994) ("DSM-IV"). Indeed, the psychiatrists caution that there may be an "imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis." *Id.* at xxiii. To be sure, a "mental disorder" or "personality disorder" diagnosis does not alone necessarily

> imply that the condition meets legal or other nonmedical criteria for what constitutes mental disease, mental disorder, or mental disability. The clinicial and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination, and competency.

Id. at xxvii. But that is why the Court in *Hendricks* reiterated that substantive due process requires that there be a finding of dangerousness linked to the person's mental problems.

Some personality disorders may well justify involuntary civil commitment for residential care and treatment under this Court's decision in *Hendricks*. Indeed, the American Psychiatric Association states that "[a] Personality Disorder is

an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress *or impairment.*" DSM-IV, at 629 (emphasis added). Recognized personality disorders include Paranoid Personality Disorder, Schizoid Personality Disorder, Schizotypal Personality Disorder, Antisocial Personality Disorder (Crane's diagnosis in this case), Borderline Personality Disorder, Histrionic Personality Disorder, Narcissistic Personality Disorder, Avoidant Personality Disorder, Dependent Personality Disorder, Obsessive-Compulsive Personality Disorder, and Personality Disorder Not Otherwise Specified. *Id.*

Several personality disorders are characterized by impulsiveness, including Antisocial Personality Disorder, but several of them would not necessarily involve a total inability to control criminal sexual behavior. *See* DSM-IV, at 629-73. Thus, the Kansas Supreme Court's holding in this case may preclude the commitment of some dangerous sex offenders with serious, diagnosed personality disorders. For example, the diagnosis for Crane in this case—Antisocial Personality Disorder—has an "essential feature" of "a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood." *Id.* at 645. Moreover, DSM-IV's extensive description of this disorder indicates that such a diagnosis is very serious and often applies to a person who poses substantial risks of engaging in criminal acts that will harm others. For example, persons with this diagnosis "fail to conform to social norms with respect to lawful behavior," "may repeatedly perform acts that are grounds for arrest," "disregard the wishes, rights, or feelings of others," "are frequently deceitful and manipulative," "may repeatedly lie," "tend to be irritable and aggressive," and "may blame the victims for being foolish, helpless, or deserving their fate," among other endearing traits. *Id.* at 646.

Nor is this a common diagnosis among the American population. DSM-IV indicates that the prevalence of Antisocial Personality Disorder "is about 3% in males and about 1% in females." DSM-IV, at 648.

This Court's decision in *Kansas v. Hendricks* established that proof of dangerousness (of which there is no real question in this case) linked to a serious mental problem (such as Crane's diagnosis of Antisocial Personality Disorder) satisfies constitutional requirements in this context. The Kansas Supreme Court simply read too much into this Court's decision. *Hendricks*, of course, reversed the Kansas Supreme Court's earlier decision invalidating the Kansas law on substantive due process grounds similar to those upon which the Kansas court once again seized in this case.

A fair reading of *Hendricks* demonstrates that this Court did not create a new substantive due process "inability to control" requirement. At most, the Court's references to lack of volitional control reflect the facts and circumstances of the case that was before the Court.

CONCLUSION

For the foregoing reasons, Kansas respectfully requests that the Court grant this petition for a writ of *certiorari* in order to resolve a deepening split of authority in the state courts.

Respectfully submitted,

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December 2000

ADDENDUM

SUPREME COURT ORDER

DISTRICT CASE NO. 97C16409

IN THE SUPREME COURT
OF THE STATE OF KANSAS

DISTRICT ATTORNEY JOHNSON COUNTY
JOHNSON COUNTY COURTHOUSE
PO BOX 728
OLATHE KS 66061

IN THE MATTER OF THE
CARE AND TREATMENT OF NO. 98-82080-AS
MICHAEL TODD CRANE

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR REHEARING OR MODIFICATION
BY STATE OF KANSAS.
CONSIDERED BY THE COURT AND DENIED.
Response noted.

DATE: 09/26/2000.

CAROL G. GREEN
CLERK

Supreme Court of Kansas.

In the Matter of the Care and Treatment of Michael T. Crane, Appellant.

No. 82,080.

July 14, 2000.

Syllabus by the Court

1. A commitment under the Sexually Violent Predator Act, K.S.A. 59-29a01 *et seq.*, is unconstitutional absent a finding that a defendant suffers from a volitional impairment rendering him or her dangerous beyond his or her control.

2. In an appeal from an order committing the defendant to custody under K.S.A. 59-29a01 *et seq.*, the record is examined, and it is held the district court committed reversible error in (1) ruling that the State is not required to prove the defendant suffers from a volitional impairment and (2) instructing the jury.

ALLEGRUCCI, J.:

Michael T. Crane appeals from the district court's order committing him to custody under the Sexually Violent Predator Act, K.S.A. 59-29a01 *et seq.* (Act).

In *State v. Crane*, 260 Kan. 208, 918 P.2d 1256 (1996), this court affirmed Michael Crane's conviction of lewd and lascivious behavior for exposing himself to a tanning salon attendant on January 6, 1993. His convictions of attempted aggravated criminal sodomy, attempted rape, and kidnapping were reversed. They arose out of an incident in a video store that took place approximately 30 minutes after the tanning salon incident.

The aggravated sexual battery conviction that supplied the prior conduct element of Crane's sexual predator determination arose out of the video store incident. In that instance, Crane

waited until he was the only customer in a video store and then grabbed the clerk from behind. With his genitals exposed, he lifted and pushed her and squeezed her neck with his hands. Crane three times ordered her to perform oral sex and said he was going to rape her. The attack ended when Crane suddenly stopped and ran out of the store.

Although the kidnapping charge could not be renewed, other charges arising from this incident were refiled. Pursuant to a plea agreement, Crane pled guilty to one count of aggravated sexual battery, a class D felony.

The present action was initiated when the State filed a petition in the district court seeking to have Crane evaluated and adjudicated a sexually violent predator. At the commitment trial, the State presented evidence of Crane's inappropriate sexual behavior on several occasions as well as the testimony of mental health professionals.

Psychologist Douglas Hippe evaluated Crane in 1994 and reviewed the mental health records subsequently compiled for Crane. He concluded that Crane suffers from antisocial personality disorder. Of the seven criteria listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) (DSM-IV) for antisocial personality disorder, Crane consistently exhibits six, in Hippe's view. Crane also suffers from exhibitionism, which is a separate disorder. According to Hippe, exhibitionism alone would not be a sufficient basis for finding that a person was a sexual predator. Crane, in his opinion, is a sexual predator due to his combination of antisocial personality disorder and exhibitionism. He cited the increasing frequency of incidents involving Crane, increasing intensity of the incidents, Crane's increasing disregard for the rights of others, and his increasing daring and aggressiveness.

Psychologist Robert Huerter tested and interviewed Crane in 1993 with regard to Crane's claiming to have been in a

blackout state during the video store incident. He concluded that Crane had not experienced blackout.

Psychiatrist Leonardo Mabugat testified that Crane suffers from antisocial personality disorder, "a pervasive pattern of disregard for and violation of the rights of others," which usually starts in or around adolescence.

The victim of the video store incident testified that the prosecuting attorney had talked with her about the State's entering into a plea agreement with Crane. The victim had been upset because she did not think that Crane would be serving enough time.

At the commitment trial, the victim expressed her disappointment in the course Crane's prosecution had taken. The prosecutor drew out her dissatisfaction by asking, "So would it be fair to say that for a crime that this Court gave a 35-to-life sentence to Mr. Crane, he only served a little over four years?" And he followed up on her affirmative response with "[a]nd understandably you're very upset about how the system treated you in this case, right?" "Yes, very," she answered. The victim had been told by the State that the kidnapping charge could not be refiled against Crane on account of a technicality.

In this regard, the prosecutor had suggested to her that obtaining a guilty plea "was the best way to go in order to be able to go down the line" and use the option of the Act. The victim agreed to the plea bargain because she believed "it was the only way to make sure that it didn't end there." The victim testified, "I was not aware that there was an option of going to trial and going through this or agreeing to the plea and then using the Sexual Predator Act. As I was—as I understood, this was the only option, but if we can get a—some kind of a conviction, then we can use this option later down the road to make sure he stays off the street."

Crane raises several issues on appeal; however, the controlling issue is whether it is constitutionally permissible to commit Crane as a sexual predator absent a showing that he was unable to control his dangerous behavior. To answer that question, we must revisit *Kansas v. Hendricks*, 521 U.S. 346, 138 L. Ed. 2d 501, 117 S. Ct. 2072 (1997). The majority opinion, written by Justice Thomas, controls the result in this case. Crane contends that the trial court erred in ruling that the Supreme Court's holding in *Hendricks* does not require a showing of a volitional impairment that prevents him from controlling his dangerous behavior when the respondent's mental disorder is a personality disorder. In its journal entry of the various stages in this proceeding, the district court ruled on February 25, 1998:

> "Respondent mixes legal and psychiatric terms. The Court finds the commission of a sexual crime and the existence of a mental abnormality or personality disorder which makes the person likely to engage in future predatory acts of violence are separate concepts and not interdependent upon one another in the sexually violent predator context. The Court denies Respondent's Motion for Summary judgment stating as a matter of law that Respondent misinterprets the holding of *Kansas v. Hendricks*, 117 S.Ct. 2072 (1997) by arguing the State must prove the existence of a mental disorder that so impairs the volitional control of Respondent as to render him unable to control his dangerous behavior. The Court holds the State must only prove the existence of a mental disorder that makes Respondent likely to reoffend."

On August 3, 1998, the district court held as a matter of law "that even though the State's expert witnesses might agree that Respondent's mental disorder does not impair his volitional control to the degree he cannot control his dangerous behavior, that K.S.A. 59-29a01 *et seq.* does not specify such a required element to be proven."

Accordingly, the jury was instructed that in order to establish that Crane is a sexually violent predator, the State had to prove (1) that Crane had been convicted of aggravated sexual battery and (2) that he "suffers from a mental abnormality or personality disorder which makes the respondent likely to engage in future predatory acts of sexual violence, if not confined in a secure facility." "Likely" was defined as "more probable to occur than not to occur." "Mental abnormality" was defined for the jury in accordance with K.S.A.1999 Supp. 59-29a02(b) as a "condition affecting the emotional or volitional capacity which predisposes a person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." "Personality disorder" was defined for the jury as a "condition recognized by the ... [DSM IV], and includes antisocial personality disorder."

Crane argues that *Hendricks* states in clear, unambiguous language that the constitutionality of the commitment procedure created by the Act depends on its application being limited to persons who cannot control their dangerous behavior. He quotes a number of passages from the majority opinion in *Hendricks* that bear on the respondent's inability to control his or her conduct. There is no question that the majority opinion is replete with references to the commitment of persons who cannot control their own behavior. See, *e.g.*, 521 U.S. at 357, 358, 360, 362, and 364.

Hendricks admitted that he had repeatedly sexually abused children and that he was unable to control the urge to do so. 521 U.S. at 355, 360. On appeal from his commitment proceeding, this court invalidated the Act on the ground that it did not predicate commitment on a finding of mental illness, which was a requirement of substantive due process. *In re Care & Treatment of Hendricks*, 259 Kan. 246, 912 P.2d 129 (1996). The Supreme Court granted certiorari on the State's petition to consider the due process issue as well as on

Hendricks's cross-petition to consider his federal ex post facto and double jeopardy claims. 521 U.S. at 350.

On the question of due process, the Supreme Court rejected this court's requiring a finding of mental illness in order to override an individual's constitutionally protected liberty interest. 521 U.S. at 356-60. The Supreme Court catalogued constitutionally permissible instances in which "States have in certain narrow circumstances provided for the forcible civil detainment of people who are *unable to control their behavior* and who thereby pose a danger to the public health and safety." (Emphasis added.) 521 U.S. at 357. The typical state statute's linking of a finding of dangerousness with an additional factor, such as mental illness, is noted, as is the Kansas Act's conformance to the pattern:

> "These added statutory requirements serve to limit involuntary civil confinement to those *who suffer from a volitional impairment rendering them dangerous beyond their control*. The Kansas Act is plainly of a kind with these other civil commitment statutes: It requires a finding of future dangerousness, and then links that finding to the existence of a 'mental abnormality' or 'personality disorder' that makes *it difficult, if not impossible, for the person to control his dangerous behavior*. Kan. Stat. Ann. § 59-29a02(b) (1994). The precommitment requirement of a 'mental abnormality' or 'personality disorder' is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to *those who are unable to control their dangerousness*." (Emphasis added.) 521 U.S. at 358.

The Supreme Court concluded:

> "To the extend that the civil commitment statutes we have considered set forth criteria relating to *an individual's inability to control his dangerousness*, the Kansas Act

> sets forth comparable criteria and Hendricks' condition doubtless satisfies those criteria.... Hendricks even conceded that, when he becomes 'stressed out,' he cannot 'control the urge' to molest children.... *This admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.* Hendricks' diagnosis as a pedophile, which qualifies as a 'mental abnormality' under the Act, thus plainly suffices for due process purposes." (Emphasis added.) 521 U.S. at 360.

Kansas' statutory scheme for commitment of sexually violent predators does not expressly prohibit confinement absent a finding of uncontrollable dangerousness. In fact, a fair reading of the statute gives the opposite impression.

The Act provides for commitment of persons determined to be sexually violent predators. A "sexually violent predator" is defined in the statute as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence." K.S.A.1999 Supp. 59-29a02(a). "Mental abnormality" is defined as a "condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." K.S.A.1999 Supp. 59-29a02(b). The phrase "likely to engage in repeat acts of sexual violence" "means the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." K.S.A.1999 Supp. 59-29a02(c).

The legislature specified that a person subject to commitment, in addition to having some history of a sexual offense or offenses, must be likely to engage in future, dangerous sexual behavior on account of a mental condition.

With regard to the mental condition, the legislature provided that it could affect either emotional capacity or volitional capacity. Volitional capacity is the capacity to exercise choice or will; a condition affecting the capacity to exercise choice or will in this context would be one that adversely affected the capacity, thereby rendering the person unable to control his or her behavior. The legislature identified emotional capacity as an alternative faculty that could be affected by the condition. Logic would seem to dictate that the alternative to a capacity involving the exercise of will is one in which the exercise of will is not at issue. Thus, a condition affecting that faculty would not necessarily remove the person's ability to control his or her behavior. It seems, therefore, that the result of the legislature's identifying emotional capacity as well as volitional capacity in the definition of mental abnormality was to include a source of bad behavior other than inability to control behavior.

The legislature also provided an alternative to a mental abnormality and that is a personality disorder. However, there is no definition of personality disorder in the Act. Thus, there is no express requirement of a finding of inability to control behavior in a personality disorder. Nor is there anything implied by the absence of a definition of personality disorder that would inject the requirement.

There also is no pattern definition of personality disorder. The Notes on Use of PIK Crim.3d 57.41 state that a pattern definition is not possible because there are too many conditions recognized by the American Psychiatric Association as constituting personality disorders. "Notwithstanding, the Committee does recommend that the trial judge fashion an appropriate definitional instruction based upon the specific diagnosis stated in the American Psychiatric Association manual." In the present case, the trial judge instructed the jury that "personality disorder" is a "condition recognized by the ... [DSM IV], and includes antisocial personality disorder."

At trial, Dr. Mabugat testified for the State that Crane suffered from the mental abnormality of exhibitionism and from the personality disorder called antisocial personality disorder. With respect to antisocial personality disorder, Dr. Mabugat testified that Crane displayed a pervasive pattern of disregard for and violation of the rights of others that included the following behavior:

> failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest; impulsivity or failure to plan ahead;
>
> irritability and aggressiveness, as indicated by repeated physical fights or assaults.

Dr. Mabugat believed that Crane's behavior was a combination of willful and uncontrollable behavior. Thus, if a volitional impairment were required for commitment under the Act, there was evidence of some inability on Crane's part to control his behavior.

Crane argues that *Hendricks* requires a volitional impairment when the person's mental condition is a personality disorder rather than a mental abnormality. Stated more generally, Crane's understanding is that the Supreme Court read a volitional impairment requirement into the Act as a condition of its constitutionality. In contrast to this court's focus on the Act's constitutionality, the Supreme Court's opinion seems to be much more specific to application of the Act to Hendricks. The particular facts of Hendricks' case, including his conceding that he cannot control his urge to sexually molest children, was at the core of the Supreme Court's opinion.

Finally, Crane directs the court's attention to a concern expressed by Justice Kennedy in his concurring opinion. After stating that the Kansas Act as applied to Hendricks conformed to Supreme Court precedents, he cautioned that "if it were shown that mental abnormality is too imprecise a category to

offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it." 521 U.S. at 373. Crane argues that antisocial personality disorder is too imprecise a basis for civil confinement. He notes that in a deposition, Dr. Mabugat estimated that probably more than 75% of prison inmates suffer from antisocial personality disorder.

In summary, the Supreme Court opinion in *Hendricks* does not seem to include consideration of willful behavior. The Act's definition of mental abnormality seems to include behavior that the respondent could control, and the Act is silent with regard to personality disorder. Crane's position is that the Supreme Court read a requirement of inability to control behavior into the Act in order to uphold its constitutionality. Thus, he argues that the Act cannot be applied to him in the absence of a finding that he was unable to control his behavior. We find merit in the defendant's argument.

A fair reading of the majority opinion in *Hendricks* leads us to the inescapable conclusion that commitment under the Act is unconstitutional absent a finding that the defendant cannot control his dangerous behavior. To conclude otherwise would require that we ignore the plain language of the majority opinion in *Hendricks*. Justice Thomas, speaking for the majority, stated that to be constitutional, a civil commitment must limit involuntary confinement to those "who suffer from a volitional impairment rendering them dangerous beyond their control." 521 U.S. at 358. He noted that the Kansas Act set forth criteria to make such a finding by linking future dangerousness to a "mental abnormality" or "personality disorder" that "makes it difficult, if not impossible," to control such behavior. 521 U.S. at 358. Hendricks met that criteria by being diagnosed as a pedophile as well as admitting that he could not control his urge to molest children.

However, in the present case, Crane suffers from a "personality disorder," which by definition does not include a

volitional impairment. As noted, there was some evidence to that effect. Within the standard of proof beyond a reasonable doubt, however, such evidence does not seem adequate. K.S.A.1999 Supp. 59-29a07(a). Its sufficiency is a question for the jury, which was not instructed to make a finding as to Crane's inability to control his behavior. Since we hold that such a finding is required, the failure to so instruct the jury was error and requires that we reverse and remand for a new trial.

Crane also argues that the State's application of the Act violates the constitutional prohibitions of ex post facto laws and double jeopardy. The element of inability to control behavior also figures in the Supreme Court's consideration of Hendricks' ex post facto and double jeopardy claims. There, it is a part of the reasoning that supports the conclusion that the Kansas Act establishes civil rather than criminal proceedings. 521 U.S. at 360-69. Because the Ex Post Facto and Double Jeopardy Clauses pertain exclusively to penal statutes, the Supreme Court concluded that the Kansas Act "runs afoul" of neither. 521 U.S. at 371.

The Supreme Court's rationale regarding the nonpunitive nature of the Kansas Act was twofold. First, commitment under the Act does not implicate objectives of criminal punishment, such as deterrence. 521 U.S. at 361-62. In that regard, the Court stated: "Those persons committed under the Act are, by definition, suffering from a 'mental abnormality' or a 'personality disorder' that *prevents them from exercising adequate control over their behavior*. Such persons are therefore unlikely to be deterred by the threat of confinement." (Emphasis added.) 521 U.S. at 362-63. Second, contrary to Hendricks' contention, the indefinite duration of confinement under the Act is not evidence of the State's punitive intent. The indefinite duration of confinement was said instead to be linked to the indeterminate suitability for release. 521 U.S. at 363-64. In addition, the periodic reviews required by the Act of the person's condition demonstrated to the Court "that

Kansas does not intend an individual committed pursuant to the Act to remain confined any longer than he suffers from a mental abnormality rendering him *unable to control his dangerousness*." (Emphasis added.) 521 U.S. at 364.

The Ex Post Facto Clause forbids inflicting punishment greater than that attached to the offense when it was committed. U.S. Const., Art. I, § 10; *State v. LaMunyon*, 259 Kan. 54, Syl. ¶ 5, 911 P.2d 151 (1996). Hendricks, like Crane, committed the sexual offenses in question before the Act became effective. The double jeopardy and ex post facto claims were rejected by the Supreme Court majority on the ground that the Act is nonpunitive. 521 U.S. at 369. As we have seen, Hendricks' admitted inability to control his behavior figured heavily in the Supreme Court's classifying the Act as nonpunitive. First, Hendricks and persons like him would not be deterred by the commitment proceeding because uncontrollable behavior is not deterrable. 521 U.S. at 362. Second, Hendricks and persons like him would be confined only as long as they were unable to control their behavior. 521 U.S. at 364. Crane contends that this does not end the inquiry because the determination whether punishment is being imposed is factual so that it may vary from case to case. His view is supported by the dissenting opinion in *Hendricks* and, perhaps more importantly, by the concurring opinion of Justice Kennedy. With five justices agreeing that factual circumstances different from those of Hendricks might warrant independent consideration of an ex post facto claim, the question is open whether the trial court was justified in concluding that the Supreme Court had foreclosed further consideration of the issue.

Justice Kennedy, writing about the majority opinion, stated that it fully explains why an ex post facto challenge could not succeed with regard to Hendricks. He continued:

> "All this, however, concerns Hendricks alone. My brief, further comment is to caution against dangers

inherent when a civil confinement law is used in conjunction with the criminal process, whether or not the law is given retroactive application.

"... As all Members of the Court seem to agree, ... the power of the State to confine persons who, by reason of a mental disease or mental abnormality, constitute a real, continuing, and serious danger to society is well established. [Citation omitted.] Confinement of such individuals is permitted even if it is pursuant to a statute enacted after the crime has been committed and the offender has begun serving, or has all but completed serving, a penal sentence, provided there is no object or purpose to punish. [Citation omitted.] The Kansas law, with its attendant protections ... is within this pattern and tradition of civil confinement....

"Notwithstanding its civil attributes, the practical effect of the Kansas law may be to impose confinement for life....

"A common response to this may be, 'A life term is exactly what the sentence should have been anyway,' or, in the words of a Kansas task force member, 'SO BE IT.' [Citation omitted.] The point, however, is not how long Hendricks and others like him should serve a criminal sentence. With his criminal record, after all, a life term may well have been the only sentence appropriate to protect society and vindicate the wrong. The concern instead is whether it is the criminal system or the civil system which should make the decision in the first place. *If the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function*....

"On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil

confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it." (Emphasis added.) 521 U.S. at 371-73.

Justice Kennedy's concerns seem to have anticipated the case now before this court. Crane's convictions of kidnapping, attempted aggravated sodomy, and attempted rape arising from an incident involving a video store clerk were reversed by this court. 260 Kan. 208. The State refiled charges of attempted aggravated sodomy and attempted rape. Then the State and Crane entered into an agreement that concluded the criminal matter with his entering a plea of guilty to the single offense of aggravated sexual battery. He pled guilty in August 1997, and his conditional release date was January 6, 1998. The victim's testimony at Crane's sexual predator trial revealed that the State told her of its intention to follow Crane's plea with a sexual predator petition in order to prolong his confinement. This typifies the problem foreseen by Justice Kennedy when he wrote of "dangers inherent when a civil confinement law is used in conjunction with the criminal process." 521 U.S. at 371-72. This case even reflects the circumstances postulated by Justice Kennedy to illustrate how the conjunction of civil confinement and criminal proceedings could go wrong—the use of civil proceedings to restore confinement time shortened by a plea bargain. Where this case deviates from the scene sketched by Justice Kennedy is that the plea agreement in this case, rather than being improvident, arose on account of Crane's already having served nearly as much time as could be imposed for his conduct.

Crane presents forceful arguments that the application of the Act in his circumstances has punitive features. Crane, unlike Hendricks, did not admit that his sexual behavior was on account of an irresistible urge. Nor was there a finding that

Crane is unable to control his behavior. Application of the Act in this case parallels circumstances Justice Kennedy cautioned against. However, we can only surmise whether Justice Kennedy would find the State has crossed the line from civil commitment to criminal punishment in the present case. As we previously noted, this case does not arise out of an improvident plea bargain. Here, the State's primary motive for filing the petition was not to obtain treatment for the defendant. However, so long as the State has an evidentiary basis for filing the petition, its motive should not render the resulting judgment and commitment of the defendant to be punitive.

We note that in *In re Care & Treatment of Hay*, 263 Kan. 822, 830-31, 953 P.2d 666 (1998), this court stated that Hay's ex post facto challenge was shattered by the Supreme Court's holding that the Act created a civil rather than criminal proceeding. In a syllabus paragraph, the court declared that commitment under the Act was not criminal or punitive and, therefore, does not violate the prohibition of ex post facto lawmaking. 263 Kan. 822, Syl. ¶ 2.

We will address the remaining issues raised by Crane, as they may again be raised in the district court on remand. Crane argues that the evidence of prior sexual conduct should not have been admitted into evidence when he had agreed to stipulate to the convictions.

The State was required to prove two elements—(1) that Crane had been charged with or convicted of a sexually violent offense and (2) that he suffers from a mental abnormality or personality disorder that makes him likely to engage in repeat acts of sexual violence. K.S.A.1999 Supp. 59-29a02(a). Accordingly, the jury was instructed as follows:

> "The State alleges the respondent is a sexually violent predator. The respondent denies the allegation.
>
> "To establish this charge, each of the following claims must be proved:

> 1. That the respondent has been convicted of Aggravated Sexual Battery, a sexually violent offense; and
>
> 2. That the respondent suffers from a mental abnormality or personality disorder which makes the respondent likely to engage in future predatory acts of sexual violence, if not confined in a secure facility."

Crane offered to stipulate with regard to his status as a convicted sexual offender. The State declined to stipulate. The State argues that evidence of offenses other than the conviction specified in the first element is relevant to the second element because mental health experts base predictions of future sexual behavior on past sexual behavior.

The district court permitted the State to decline to stipulate and to call a number of witnesses who testified about past instances of Crane's sexual behavior. The statement of facts in the State's brief on appeal recounts the testimony of 11 "behavior" witnesses. Most of them testified about incidents that were not subject to proof. That is, most of them testified about incidents other than the aggravated sexual battery that was the basis for the conviction the jury was required to find.

In *Hay*, the respondent complained about the admission of uncharged conduct. The court made short work of Hay's position: "The critical issues in a sexual predator case make the evidence of prior conduct, charged or uncharged, material evidence in the case. We hold the prohibitions of K.S.A. 60-455 are not applicable or governing in a case of this nature." 263 Kan. at 838. Hay challenged the admission of evidence of specific conduct. The court said it

> "was clearly relevant to prove he suffers from the condition of pedophilia and that he is likely to engage in predatory acts of sexual violence in the future. We are hard-pressed to see how such evidence can be prohibited by K.S.A. 60-455 when it is an essential element of the

required proof and necessary for the decision-making process of the jury." 263 Kan. at 837.

In this case, Crane argues that K.S.A. 60-447 should be effective where 60-455 was not, and he relies on *State v. Lee*, 266 Kan. 804, 977 P.2d 263 (1999), to give effect to his offer to stipulate to conviction of aggravated sexual battery. K.S.A. 60-447 excludes evidence of specific instances of conduct, other than evidence of conviction of a crime, as proof of a character trait. *Gardner v. Pereboom*, 197 Kan. 188, 416 P.2d 67 (1966). Because most, if not all, of the complained-of evidence was evidence of conviction of crimes, it would not have been excluded by K.S.A. 60-447. Crane's reliance on *Lee* also lacks merit. In that case, the court held that a criminal defendant's request to stipulate that he or she is a convicted felon must be honored and that the stipulation will satisfy the State's burden of proving the convicted felon element of the crime of criminal possession of a firearm. 266 Kan. 804, Syl. ¶ 4. The application of *Lee*, a criminal proceeding, to the present proceeding is questionable due to the criminal/civil dichotomy. However, we need not answer that question. In *Lee*, the court cautioned: "Our views should not be read as limiting the State in presenting a full in-depth story of a prior crime when the prior crime has relevance independent of merely proving prior felony status for K.S.A. 21-4204(a)(4) [possession of a firearm by a convicted felon]." 266 Kan. at 816. This court held in *Hay* that the evidence of prior conduct was material to the question of likelihood that the respondent would engage in repeat conduct as well as to the element of conviction of prior conduct. Thus, the court's holding in *Lee* does not apply in this sexual predator proceeding.

Crane next argues that the State's failure to personally serve him deprived the district court of jurisdiction. Crane contends that the Act is a subpart of the Care and Treatment Act for Mentally Ill Persons (CTAMIP), K.S.A.1999 Supp. 59-2945 *et seq*. He would have the court regard the provision for

notice to proposed patients within the CTAMIP as an umbrella provision extending to the Act. His construct does not withstand examination of the statutes. Both Acts are in the Probate Code, Chapter 59. They do not occupy the same article, however. The CTAMIP constitutes Article 29 of Chapter; the Act constitutes Article 29a. The Articles have different names, different definitions, and different functions. Without an express reference in the Act to the notice provision of CTAMIP, there is no basis for believing that it applies equally under both.

Finally, Crane argues that the timing of the State's petition against him did not comply with statutory requirements. The State filed a sexual predator petition against Crane on December 11, 1997. He was released on parole on January 6, 1998. Crane contends that as a consequence of the State's failing to serve him personally with notice, the action was not commenced against him before his conditional release. As discussed in the preceding paragraph, with no personal service requirement in the Act, there is no basis for Crane's contention in that regard.

With respect to the timing of the petition, there is nothing in the record to suggest that it was improper under the version of K.S.A. 59-29a04 that was effective at the time of Crane's release. K.S.A.1997 Supp. 59-29a04 provided for a petition to be filed by the attorney general within 75 days of receiving written notice that Crane's release was scheduled. K.S.A.1997 Supp. 59-29a03(a)(1) required the Department of Corrections to give notice 90 days prior to Crane's anticipated release.

It may be noted that in 1999 the legislature added the following proviso to 59-29a04: "The provisions of this section are not jurisdictional, and failure to comply with such provisions in no way prevents the attorney general from proceeding against a person otherwise subject to the provision of K.S.A. 59-29a01 *et seq*., and amendments thereto." K.S.A. 1999 Supp. 59-29a04(b).

The judgment of the district court is reversed, and the case is remanded for a new trial.

IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT

IN THE MATTER OF THE CARE AND TREATMENT OF MICHAEL TODD CRANE

Case No. 97C16409
Court No. 1

JOURNAL ENTRY

Now on the 28th day of January, 1998, the above matter comes on for a Probable Cause hearing before the Honorable Peter V. Ruddick, Judge of the District Court of Johnson County, Kansas. The State appears by Special Assistant Attorney Generals W. Scott Toth and Brenda Cameron. Respondent appears in person and in custody and with court appointed counsel John C. Donham. Respondent argues the Court is without subject matter or personal jurisdiction as the State has not served him personally with a copy of the Petition or a summons as required by Civil Rules of Procedure. The Court finds as a matter of law that K.S.A. 59-29a01, et seq does not contain a provision requiring personal service on the proposed patient and denies Respondent's motion to dismiss the proceeding. Respondent argues the State did not follow the statutory procedure contained within K.S.A. 59-29a01, et seq for initiating an involuntary commitment proceeding because it chose instead to release Respondent on parole. The Court takes this motion under advisement to give both parties an opportunity to brief their positions. Respondent argues that this proceeding represents an *ex post facto* application of a punitive measure and subjects him to double jeopardy. The Court makes a finding that as a matter of law, the issues of *ex post facto* and double jeopardy and the prohibition as to either under the Constitutions of the State of Kansas and the United States are controlled by the U.S. Supreme Court decision in Kansas v. Hendricks, 117 S.Ct. 2072 (1997) and denies Respondent's motion to dismiss the proceeding. Respondent argues that the use of prior criminal convictions by the State to

prove he is a sexual predator is barred by the principle of *res judicata* and/or collateral estopple in that the State is now seeking to prove the existence of a mental abnormality or personality disorder that impairs Respondent's volitional control to the degree that he cannot control his dangerous behavior. To enter a finding of Guilty to a criminal offense, a prior Court of competent jurisdiction would have necessarily found Respondent acted knowingly, willfully and purposefully in committing the prior crime. The Court finds that as a matter of law, the State is only required to prove Respondent's mental disorder makes him likely to reoffend and denies his motion to prohibit the State from using evidence of his prior convictions. Respondent argues that his involuntary commitment proceeding should be closed to the general public to prevent disclosure of confidential information to the public by the press. The Court finds as a matter of law that K.S.A. 59-29a01, et seq contains no provision on this issue and denies his motion. The State presents evidence and rests. Respondent presents no evidence. The Court finds there is probable cause to believe Respondent is a sexual predator as that term is defined in K.S.A. 59-29a01 et seq and orders Respondent transported to Larned State Hospital for an evaluation pursuant to K.S.A. 59-29a01 et seq.

Now on this 25th day of February, 1998, the above matter comes on for hearing on Respondent's motions before the Honorable Peter V. Ruddick. The State appears by W. Scott Toth and Brenda Cameron. Respondent appears by and through counsel John C. Donham. Respondent argues again that use of prior criminal convictions to prove the existence of a mental disorder impairing his volitional control to the degree he cannot control his dangerous behavior constitutes the seeking of a diametrically opposed result reached by a prior Court that found his conduct wilful, purposeful and not by accident. The Court finds that the principle of *res judicata* does not bar the State from introducing evidence of Respondent's prior criminal convictions as "mental

abnormality" and "personality disorder" are psychiatric terms whereas "criminal intent" is a legal term and the two are independent concepts. The proof of one does not rule out the existence of the other. The Court denies Respondent's motion to prohibit the State from using evidence of his prior criminal convictions. Respondent also argues that he should be granted summary judgment in this matter as the State has no evidence he committed any sexual act while his volitional control was impaired by any mental disorder to the degree he was unable to control his dangerous behavior. The Court finds that while the facts stated in Respondent's motion are uncontroverted, as a matter of law Respondent mixes legal and psychiatric terms. The Court finds the commission of a sexual crime and the existence of a mental abnormality or personality disorder which makes the person likely to engage in future predatory acts of violence are separate concepts and not interindependent upon one another in the sexually violent predator context. The Court denies Respondent's Motion for Summary Judgment stating as a matter of law that Respondent misinterprets the holding of Kansas v. Hendricks, 117 S.Ct. 2072 (1997) by arguing the State must prove the existence of a mental disorder that so impairs the volitional control of Respondent as to render him unable to control his dangerous behavior. The Court holds the State must only prove the existence of a mental disorder that makes Respondent likely to reoffend.

Now on this 13th day of May, 1998, the above matter comes on for hearing on Respondent's motion to dismiss on constitutional grounds before the Honorable Peter V. Ruddick. The State appears by W. Scott Toth and Brenda Cameron. Respondent appears personally, in custody and with counsel, John C. Donham. The Court denies Respondent's motion finding as a matter of law that the State did not deny Respondent due process of law by withholding sex offender treatment until Respondent completed his prison sentence. The Court notes that Respondent's argument that structuring his treatment program so as to run consecutive to his prison

sentence rather than concurrent with it as evidence of a punitive purpose has been settled by the decision in Kansas v. Hendricks, 117 S.Ct. 2072 (1997). The Court finds as a matter of law that Respondent is not subjected to double jeopardy, *ex post facto* application of law or denial of due process. The Court next takes up Respondent's Motion for Summary Judgment and denies same finding as a matter of law that Respondent's argument is really one of interpretation of the Sexual Predator Act and not one driven by uncontroverted facts. The Court rules that the release of Respondent by the State on parole after the State filed its Petition but before it served Respondent with notice of the involuntary commitment proceeding does not bar the State from proceeding in this matter and, further, that personal service on Respondent is not required.

Now on this 3rd day of August, 1998, the above matter comes on for hearing before the Honorable Peter V. Ruddick on Respondent's motion for summary judgment. The Court makes a factual finding that the State has controverted one or more facts. As a matter of law, the Court further finds that even though the State's expert witnesses might agree that Respondent's mental disorder does not impair his volitional control to the degree he cannot control his dangerous behavior, that K.S.A. 59-29a01 et seq does not specify such a required element to be proven. The Court denies Respondent's motion for summary judgment. The Court also denies Respondent's motion to exclude testimony from Respondent's victims as to his specific conduct pursuant to K.S.A. 60-447.

Now on this 10th day of August, 1998, the above matter comes on for trial in the District Court of Johnson County, Kansas before the Honorable Peter V. Ruddick. The State appears by W. Scott Toth and Brenda Cameron, Special Assistant Attorney Generals. The Respondent appears in person and with counsel, John C. Donham. Respondent argues pretrial that the relitigation of his prior offenses through the

testimony of witnesses constitutes successive prosecution and double jeopardy. The Court denies his motion to dismiss on those grounds finding as a matter of law that under Hendricks, such testimony is accepted. Respondent renews all of his prior pretrial motions and argues additional motions. The Court denies them and grants Respondent's request for a continuing objection to all adverse rulings on his pretrial motions. A jury of 12 plus 2 alternates is selected and sworn. The State presents evidence and rests. Respondent moves for a directed verdict arguing no evidence Respondent's volitional control is impaired. The Court denies the motion. Respondent offers no evidence. Over Respondent's objection, the jury is not instructed that the State must prove Respondent suffers a mental disorder that impairs his volitional control to the degree he cannot control his dangerous behavior. The jury returns a unanimous verdict that Respondent is a sexual predator. The Court orders Respondent committed to the custody of the Secretary of Social and Rehabilitation Services for control, care and treatment pursuant to K.S.A. 59-29a01 et seq.

Submitted by,

/s/ John C. Donham
John C. Donham, #13394
Attorney for Respondent
8000 Foster,
Overland Park, Ks. 66204
(913) 648-3220

Approved by,

/s/ W. Scott Toth
W. Scott Toth
Special Assistant
Attorney General

/s/ Peter V. Ruddick
Peter V. Ruddick
Judge of the District Court

ORIGINAL

Supreme Court, U.S.
FILED
JAN 11 2001
CLERK

No. 00-957

IN THE
SUPREME COURT OF THE UNITED STATES

IN THE MATTER OF THE CARE AND TREATMENT
OF MICHAEL T. CRANE

STATE OF KANSAS,
Petitioner

v.

MICHAEL T. CRANE,
Respondent

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The respondent asks leave to proceed *in forma pauperis*.

Respondent has previously been granted leave to proceed *in forma pauperis* in the following courts:

To the Kansas Supreme Court to appeal his criminal conviction in District Court case No. 93CR0028;

To the Kansas Supreme Court to appeal his involuntary civil commitment in District Court case No. 97C16409;

Additionally, in each of the above District Court cases, Respondent was represented by court appointed counsel.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

John C. Donham, #13394
Attorney for Michael T. Crane
115 South Kansas Ave.
Olathe, Kansas 66061
(913) 764-3012

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11 pp

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, MICHAEL T. CRANE, am the ~~petitioner~~ respondent in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ -0-	$	$ -0-	$
Self-employment	$ -0-	$	$ -0-	$
Income from real property (such as rental income)	$ -0-	$	$ -0-	$
Interest and dividends	$ -0-	$	$ -0-	$
Gifts	$ -0-	$	$ -0-	$
Alimony	$ -0-	$	$ -0-	$
Child Support	$ -0-	$	$ -0-	$
Retirement (such as social security, pensions, annuities, insurance)	$ -0-	$	$ -0-	$
Disability (such as social security, insurance payments)	$ -0-	$	$ -0-	$
Unemployment payments	$ -0-	$	$ -0-	$
Public-assistance (such as welfare)	$ -0-	$	$ -0-	$
Other (specify): WORK PROGRAM IN SEXUAL PREDATOR FACILITY	$ 144.00 MTC	$	$ 144.00 MTC	$
Total monthly income:	$ 144.00 MTC	$	$ 144.00 MTC	$

BEST AVAILABLE COPY

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
KANSAS SEXUAL PREDATOR WORK PROGRAM	LARNED STATE SECURITY HOSPITAL LARNED, KS 67550	FEB 2006 -- PRESENT	$ 144.00 MTC
- NONE -			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
			$
			$
			$

4. How much cash do you and your spouse have? $ APX. $700.00
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
MTC First National Bank of Larned	Checking MTC	$ $700.00	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings. NONE

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
-0-	$_____	$_____
_____	$_____	$_____
_____	$_____	$_____

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
-0-	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ -0-	$_____
Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ -0-	$_____
Home maintenance (repairs and upkeep)	$ -0-	$_____
Food	$ -0-	$_____
Clothing	$ -0-	$_____
Laundry and dry-cleaning	$ 9.50	$_____
Medical and dental expenses RESPONSIBLE FOR OWN OPTICAL & DENTAL EXPENSES	$ ZERO (SUGAR)	$_____
Transportation (not including motor vehicle payments)	$ -0-	$_____
Recreation, entertainment, newspapers, magazines, etc.	$_____	$_____
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ -0-	$_____
Life	$ -0-	$_____
Health	$ -0-	$_____
Motor Vehicle	$ -0-	$_____
Other: _____	$ -0-	$_____
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ -0-	$_____
Installment payments		
Motor Vehicle	$ -0-	$_____
Credit card(s)	$ -0-	$_____
Department store(s)	$ -0-	$_____
Other: _____	$ -0-	$_____
Alimony, maintenance, and support paid to others	$ -0-	$_____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ -0-	$_____
Other (specify): Stationaire / Hygiene	$ 16.50	$_____
Total monthly expenses:	$ 26.00	$_____

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☒ Yes ☐ No If yes, describe on an attached sheet.

THE WORK PROGRAM IS FOR ONE YEAR ONLY. IT ENDS ON/or about Feb 17th AND MY INCOME WILL GO TO ZERO.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

HAVE BEEN INCARCERATED BY THE STATE OF KANSAS SINCE JANUARY 1993.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: January 5th, 2001

Michael D. Crane

(Signature)

JURISDICTION

Respondent files this Brief in Opposition pursuant to Supreme Court Rule 15.

REASON NOT TO GRANT A WRIT OF CERTIORARI

The Kansas Supreme Court correctly interpreted the limitations this Court imposed upon the states concerning the constitutional use of involuntary civil commitment proceedings against citizens.

The State cites other jurisdictions that have reached a contrary result. In those cases relied upon by the State, the issue on appeal was the not whether volitional control impairment needed to be proven, but rather the degree of volitional control impairment that needed to be proven. The Kansas Supreme Court followed this Court's ruling that to constitutionally impose an involuntary civil commitment to a mental hospital, the state must prove to a jury that the proposed patient suffers from a mental disorder that impairs his volitional control to the degree he cannot control his dangerous behavior. The Kansas Supreme Court found that the trial court below erred in not so instructing the jury and remanded for a new trial. This is not a case that represents a diverging view of this Court's ruling in *Kansas v. Hendricks*, 521 U.S. 346 (1997).

PERCEIVED MISSTATEMENTS OF LAW OR FACT

The civil proceeding against Mr. Crane was brought under K.S.A. 1996 Supp. 59-29a01 *et seq* - not K.S.A. 1999 Supp. 59-29a01 *et seq*. (The 1996 Supplement is attached as appendix "A").

K.S.A. 1996 Supp. 59-29a02(a) defined "sexually violent predator" as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts

of sexual violence, if not confined in a secure facility."

K.S.A. 1996 Supp. 59-29a02 did not carry a definition of "likely to engage in repeat acts of sexual violence".

There is an inference in the State's petition on page 5 that the Kansas Supreme Court reached its decision to reverse and remand for a new trial based upon the absence within the Kansas statute defining "personality disorder" of the element of "volitional control". The Kansas Supreme Court reached its decision based upon the State's Attorney General arguing consistently throughout the proceeding at the trial court level that volitional impairment was not an element to be proven. The trial court agreed and refused to so instruct the jury. The Kansas Supreme Court noted that the legislative body had not amended the statutes to reflect this Court's decision in *Hendricks* but that the inescapable conclusion, in light of *Hendricks*, is that before the State can involuntarily commit a person to a mental hospital, there must be a finding that the person has lost the ability to control his dangerous behavior.

CONCLUSION

The State of Kansas seeks a review by this Court based upon what it calls a widening split among the individual states concerning this Court's ruling in *Hendricks*. This case is not at odds with those cases cited by the State. The cited cases concede volitional impairment must be shown.

Respectfully submitted,

John C. Donham, #13394
Attorney for Michael T. Crane
115 South Kansas Ave.
Olathe, Kansas 66061
(913) 764-3012

CASE ANNOTATIONS

1. Sexually violent predator act held unconstitutional violation of substantive due process. In re Care & Treatment of Hendricks, 259 K. 346, 350, 912 P.2d 129 (1996).

59-29a03. Same; notice of release of sexually violent predator by agency with jurisdiction to attorney general and multidisciplinary team, time, contents; immunity from liability; establishing a multidisciplinary team; appointment of a prosecutor's review committee; assessment of person. (a) When it appears that a person may meet the criteria of a sexually violent predator as defined in K.S.A. 59-29a02 and amendments thereto, the agency with jurisdiction shall give written notice of such to the attorney general and the multidisciplinary team established in subsection (d), 90 days prior to:

(1) The anticipated release from total confinement of a person who has been convicted of a sexually violent offense, except that in the case of persons who are returned to prison for no more than 90 days as a result of revocation of postrelease supervision, written notice shall be given as soon as practicable following the person's readmission to prison;

(2) release of a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial pursuant to K.S.A. 22-3305 and amendments thereto;

(3) release of a person who has been found not guilty by reason of insanity of a sexually violent offense pursuant to K.S.A. 22-3428 and amendments thereto; or

(4) release of a person who has been found not guilty of a sexually violent offense pursuant to K.S.A. 22-3428, and amendments thereto, and the jury who returned the verdict of not guilty answers in the affirmative to the special question asked pursuant to K.S.A. 22-3221.

(b) The agency with jurisdiction shall inform the attorney general and the multidisciplinary team established in subsection (d) of the following:

(1) The person's name, identifying factors, anticipated future residence and offense history; and

(2) documentation of institutional adjustment and any treatment received.

(c) The agency with jurisdiction, its employees, officials, members of the multidisciplinary team established in subsection (d), members of the prosecutor's review committee appointed as provided in subsection (e) and individuals constitute proceedings in accordance with the care and treatment act for mentally ill persons.

History: L. 1996, ch. 167, § 41; Apr. 18.

59-29a04. Same; report of arresting officer confidential. The arresting officer's report made pursuant to K.S.A. 1996 Supp. 59-2985 and amendments thereto shall not be available to inspection or copy by any persons other than the person arrested, that person's attorney, the county or district attorney and the judge of the district court.

History: L. 1996, ch. 167, § 42; Apr. 18.

Article 29a—COMMITMENT OF SEXUALLY VIOLENT PREDATORS

Law Review and Bar Journal References:

"The Civil Commitment of Sexually Violent Predators in Kansas: A Modern Law for Modern Times," Kelly A. McCaffrey, 42 K.L.R. 887 (1994).

"Kansas' Sexual Predator Act and the Impact of Expert Prediction: Psyched Out by the Daubert Test," Clayton C. Slagg, 34 W.L.J. 320 (1995).

Attorney General's Opinions:

Sexual predator act is not applicable to juvenile offenders. 94-106.

59-29a01.

CASE ANNOTATIONS

1. Sexually violent predator act held unconstitutional violation of substantive due process. In re Care & Treatment of Hendricks, 259 K. 346, 347, 912 P.2d 129 (1996).

59-29a02. Same; definitions. As used in this act:

(a) "Sexually violent predator" means any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence, if not confined in a secure facility.

(b) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.

(c) "Predatory" means acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization.

(d) "Sexually motivated" means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant's sexual gratification.

were incurred were instituted without probable cause and not in good faith.

History: L. 1996, ch. 167, § 37; Apr. 18.

59-2903. Notice of death of patients in treatment facilities. In the event of the death of a patient in a treatment facility, the head of the treatment facility shall immediately give notice of the date, time, place and cause of such death, to the extent known, to the nearest known relative of the patient, and, as appropriate, to the court having jurisdiction over the patient, the attorney for the patient, and to the county or district attorney and as otherwise provide for by law, to the coroner for the county in which the patient died.

History: L. 1996, ch. 167, § 38; Apr. 18.

59-2983. Applicability to persons in custody on criminal charges. Nothing in this act shall be construed to apply to any person alleged or thought to be a mentally ill person subject to involuntary commitment for care and treatment under this act who is in custody on a criminal charge, except with the consent of either the prosecuting attorney or trial court.

History: L. 1996, ch. 167, § 39; Apr. 18.

59-2984. Severability. If any provision of this act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

History: L. 1996, ch. 167, § 40; Apr. 18.

59-2985. Issue of mental illness upon arrest of certain persons; proceedings. Whenever any person is taken into custody by an arresting officer and such officer has reasonable grounds to believe that such person has violated K.S.A. 21-3430, 21-3421, 21-3422, 21-3502, 21-3503, 21-3504, 21-3505, 21-3506, 21-3507, 21-3508, 21-3509, 21-3510, 21-3511, 21-3512, 21-3513, 21-3602 or 21-3603 and amendments thereto, the officer shall forthwith report such facts to the county or district attorney by a written report under oath, and the county or district attorney may submit such report to the judge of the district court. If the court finds from an examination of the report that there is evidence raising the issue of the mental illness of the person who was arrested, the court shall direct the county or district attorney to sign and file a petition to in-

tracting, appointed or volunteering to perform services hereunder shall be immune from liability for any good-faith conduct under this section.

(d) The secretary of corrections shall establish a multidisciplinary team which may include individuals from other state agencies to review available records of each person referred to such team pursuant to subsection (a). The team, within 30 days of receiving notice, shall assess whether or not the person meets the definition of a sexually violent predator, as established in K.S.A. 59-29a02 and amendments thereto. The team shall notify the attorney general of its assessment.

(e) The attorney general shall appoint a prosecutor's review committee to review the records of each person referred to the attorney general pursuant to subsection (a). The prosecutor's review committee shall assist the attorney general in the determination of whether or not the person meets the definition of a sexually violent predator. The assessment of the multidisciplinary team shall be made available to the attorney general and the prosecutor's review committee.

History: L. 1994, ch. 316, § 3; L. 1995, ch. 193, § 2; L. 1995, ch. 251, § 33; Jan. 1, 1996.

Attorney General's Opinions:

Sexually violent predators; civil commitment, parole board is an agency with jurisdiction 94-100

Maliciously exposing a paroled or discharged person; name of person subject to sexually violent predator civil commitment proceeding 94-117.

CASE ANNOTATIONS

1. Fees of appointed counsel and expert witnesses in sexually violent predator act litigation are responsibility of county. In re Care & Treatment of Rabora, 259 K. 813, 818, 916 P.2d 15 (1996).

59-29a04. Same; petition, time, contents. When it appears that the person presently confined may be a sexually violent predator and the prosecutor's review committee appointed as provided in subsection (e) of K.S.A. 59-29a03 and amendments thereto has determined that the person meets the definition of a sexually violent predator, the attorney general may file a petition, within 75 days of the date the attorney general received the written notice by the agency of jurisdiction as provided in subsection (a) of K.S.A. 59-29a03 and amendments thereto, alleging that the person is a sexually violent predator and stating sufficient facts to support such allegation.

History: L. 1994, ch. 316, § 4; L. 1995, ch. 193, § 3; May 4.

Attorney General's Opinions:

Maliciously exposing a paroled or discharged person; name of person subject to sexually violent predator civil commitment proceeding 94-117.

CASE ANNOTATIONS

1. Fees of appointed counsel and expert witnesses in sexually violent predator act litigation are responsibility of county. In re Care & Treatment of Rabora, 259 K. 813, 818, 916 P.2d 15 (1996).

59-29a05. Same; determination of probable cause, hearing; evaluation; person taken into custody. (a) Upon filing of a petition under K.S.A. 59-29a04, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If such determination is made, the judge shall direct that person be taken into custody.

(b) Within 72 hours after a person is taken into custody pursuant to subsection (a), such person shall be provided with notice of, and an opportunity to appear in person at, a hearing to contest probable cause as to whether the detained person is a sexually violent predator. At this hearing the court shall: (1) Verify the detainer's identity; and (2) determine whether probable cause exists to believe that the person is a sexually violent predator. The state may rely upon the petition and supplement the petition with additional documentary evidence or live testimony.

(c) At the probable cause hearing as provided in subsection (b), the detained person shall have the following rights in addition to the rights previously specified: (1) To be represented by counsel; (2) to present evidence on such person's behalf; (3) to cross-examine witnesses who testify against such person; and (4) to view and copy all petitions and reports in the court file.

(d) If the probable cause determination is made, the court shall direct that the person be transferred to an appropriate secure facility, including, but not limited to, a county jail, for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination.

History: L. 1994, ch. 316, § 5; L. 1995, ch. 193, § 4; May 4.

59-29a06. Same; trial; counsel and experts; indigent persons; jury. Within 60 days after the completion of any hearing held pursuant to K.S.A. 59-29a05 and amendments thereto, the court shall conduct a trial to determine whether the person is a sexually violent predator. The trial

may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent will not be substantially prejudiced. At all stages of the proceedings under this act, any person subject to this act shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist such person. Whenever any person is subjected to an examination under this act, such person may retain experts or professional persons to perform an examination of such person's behalf. When the person wishes to be examined by a qualified expert or professional person of such person's own choice, such examiner shall be permitted to have reasonable access to the person for the purpose of such examination, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court, upon the person's request, shall determine whether the services are necessary and reasonable compensation for such services. If the court determines that the services are necessary and the expert or professional person's requested compensation for such services is reasonable, the court shall assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf. The court shall approve payment for such services upon the filing of a certified claim for compensation supported by a written statement specifying the time expended, services rendered, expenses incurred on behalf of the person and compensation received in the same case or for the same services from any other source. The person, the attorney general, or the judge shall have the right to demand that the trial be before a jury. Such demand for the trial to be before a jury shall be filed, in writing, at least four days prior to trial. Number and selection of jurors shall be determined as provided in K.S.A. 22-3403, and amendments thereto. If no demand is made, the trial shall be before the court.

History: L. 1994, ch. 316, § 6; L. 1995, ch. 193, § 5; May 4.

59-29a07. Same; determination; commitment procedure; interagency agreements; mistrials. (a) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If such determination that the person is a sexually violent predator is made by a jury, such determination shall be by unanimous verdict of such jury. Such determination may be appealed. If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the secretary of social and rehabilitation services for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large. Such control, care and treatment shall be provided at a facility operated by the department of social and rehabilitation services. At all times, persons committed for control, care and treatment by the department of social and rehabilitation services pursuant to this act shall be kept in a secure facility and such persons shall be segregated at all times from r other patient under the supervision of the sec tary of social and rehabilitation services and commencing June 1, 1995, such persons committed pursuant to this act shall be kept in a facility or building separate from any other patient under the supervision of the secretary. The department of social and rehabilitation services is authorized to enter into an interagency agreement with the department of corrections for the confinement of such persons. Such persons who are in the confinement of the secretary of corrections pursuant to an interagency agreement shall be housed and managed separately from offenders in the custody of the secretary of corrections, and except for occasional instances of supervised incidental contact, shall be segregated from such offenders. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct the person's release. Upon a mistrial, the court shall direct that the person be held at an appropriate secure fac ity, including, but not limited to, a county jail, u another trial is conducted. Any subsequent trial following a mistrial shall be held within 90 days of the previous trial, unless such subsequent trial is continued as provided in K.S.A. 59-29a06 and amendments thereto.

(b) If the person charged with a sexually violent offense has been found incompetent to stand trial, and is about to be released pursuant to K.S.A. 22-3305 and amendments thereto, and such person's commitment is sought pursuant to subsection (a), the court shall first hear evidence and determine whether the person did commit the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence ap-

plicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on such person's own behalf, the extent to which the evidence could be reconstructed without the assistance of the person and the strength of the prosecution's case. If after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, the court shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

History: L. 1994, ch. 316, § 7; L. 1995, ch. 193, § 6; May 4.

Attorney General's Opinions:

Sexually violent predator act; commitment; attempted escape; use of deadly force 94-140

59-29a08. Same; annual examinations; discharge petitions by persons committed under this act over the secretary's objection at time of annual examination, procedure. Each person committed under this act shall have a current examination of the person's mental condition made once every year. The person may retain, or if the person is indigent and so requests the court may appoint a qualified professional person to examine such person, and such expert or professional person shall have access to all records concerning the person. The yearly report shall be provided to the court that committed the person under this act. The court shall conduct an annual review of the status of the committed person. Nothing contained in this act shall prohibit the person from otherwise petitioning the court for discharge at this hearing. The secretary of the department of social and rehabilitation services shall provide the committed person with an annual written notice of the person's right to petition the court for release over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall forward the notice and waiver form to the court with the annual report. The committed person shall have a right to have an attorney represent the person at the hearing but the person is not entitled to be present at the hearing. If the court at the hearing determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged, then the court shall set a hearing on the issue. At the hearing, the committed persoe shall be entitled to be present and entitled to the benefit of all constitutional protections that were afforded the person at the initial commitment proceeding. The attorney general shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to have experts evaluate the person on the person's behalf and the court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large and if released is likely to engage in acts of sexual violence.

History: L. 1994, ch. 316, § 8; L. 1995, ch. 193, § 7; May 4.

59-29a10. Petition for release; procedure. If the secretary of the department of social and rehabilitation services determines that the person's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence if released, the secretary shall authorize the person to petition the court for release. The petition shall be served upon the court and the attorney general. The court, upon receipt of the petition for release, shall order a hearing within 30 days. The attorney general shall represent the state, and shall have the right to have the petitioner examined by an expert or professional person of such attorney's choice. The hearing shall be before a jury if demanded by either the petitioner or the attorney general. The burden of proof shall be upon the attorney general to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and that if discharged is likely to commit predatory acts of sexual violence.

History: L. 1994, ch. 316, § 10; L. 1995, ch. 193, § 8; May 4.

59-29a16. Same; confidential or privileged information and records. In order to protect the public, relevant information and records which are otherwise confidential or privileged shall be released to the agency with jurisdiction or the attorney general for the purpose of meeting the notice requirement provided in K.S.A. 59-29a03 and amendments thereto and determining whether a person is or continues to be a sexually violent predator. The provisions of this section shall be part of and supplemental to the provisions of K.S.A. 59-29a01 through 59-29a15 and amendments thereto.

History: L. 1995, ch. 193, § 9; May 4.

59-29a17. Same; court records; sealed and opened by court order. Any psychological reports, drug and alcohol reports, treatment records, reports of the diagnostic center, medical records or victim impact statements which have been submitted to the court or admitted into evidence under this act shall be part of the record but shall be sealed and opened only on order of the court or as provided in K.S.A. 59-29a01 et seq. and amendments thereto. The provisions of this section shall be part of and supplemental to the provisions of K.S.A. 59-29a01 through 59-29a15 and amendments thereto.

History: L. 1995, ch. 193, § 10; May 4.

Article 30.—GUARDIANS OR CONSERVATORS

Cross References to Related Sections:

Kansas guardianship program, see 74-9601 et seq.

59-3002. Definitions. When used in the act for obtaining a guardian or conservator, or both:

(a) "Disabled person" means any adult person whose ability to receive and evaluate information effectively or to communicate decisions, or both, is impaired to such an extent that the person lacks the capacity to manage such person's financial resources or, except for reason of indigency, to meet essential requirements for such person's physical health or safety, or both. A person shall not be considered to be disabled or to lack capacity to meet the essential requirements for physical health or safety for the sole reason such person relies upon or is being furnished treatment by spiritual means through prayer, in lieu of medical treatment, in accordance with the tenets and practices of a recognized church or religious denomination of which such person is a member or adherent.

(b) "Manage financial resources" means those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income.

(c) "Meet essential requirements for physical health or safety" means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is more likely than not to occur.

(d) "Guardian" means an individual or a nonprofit corporation certified in accordance with K.S.A. 59-3037 and amendments thereto ch has been appointed by a court to act on be. of a ward and possessed of some or all of the powers and duties set out in K.S.A. 59-3018 and amendments thereto. "Guardian" does not mean natural guardian unless specified.

(e) "Natural guardian" means both the father and mother of a minor if neither parent has been found to be a disabled person or had parental rights terminated by a court of competent jurisdiction. If either parent of a minor dies, has been found to be a disabled person or has had parental rights terminated by a court of competent jurisdiction, the other shall be the natural guardian.

(f) "Conservator" means an individual or a corporation who is appointed by the court to act on behalf of a conservatee and who is possessed of some or all of the powers and duties set out in K.S.A. 59-3019 and amendments thereto.

(g) "Minor" means any person defined by K.S.A. 38-101 and amendments thereto as being within the period of minority.

(h) "Proposed ward" means a perso or whom a petition for the appointment of a guardian pursuant to K.S.A. 59-3006 and amendments thereto has been filed.

(i) "Proposed conservatee" means a person for whom a petition for the appointment of a conservator pursuant to K.S.A. 59-3006 and amendments thereto has been filed.

(j) "Ward" means a person who has a guardian.

(k) "Conservatee" means a person who has a conservator.

(l) The terms defined in K.S.A. 1996 Supp. 59-2946 and amendments thereto have the meanings provided by that statute.

Supreme Court U.S.
FILED
JAN 11 2001
CLERK

(2)

No. 00-957

In the
SUPREME COURT OF THE UNITED STATES

In the matter of the Care and Treatment of
Michael T. Crane,
State of Kansas,

Petitioner,

v.

Michael T. Crane,

Respondent.

Brief of the States of Missouri, Alabama, Florida Maryland, Massachusetts, Nebraska, North Dakota, Oklahoma and South Carolina In Support of Writ of Certiorari to the Supreme Court of Kansas

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QUESTION PRESENTED

Whether the Fourteenth Amendment's Due Process Clause requires a State to prove that a sexually violent predator "cannot control" his criminal sexual behavior before the State can civilly commit him for residential care and treatment?

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No. 00-957

In the
SUPREME COURT OF THE UNITED STATES

In the matter of the Care and Treatment of Michael T. Crane

State of Kansas,

Petitioner,

v.

Michael T. Crane,

Respondent.

Brief of the States of Missouri, Alabama, Florida Maryland, Massachusetts, Nebraska, North Dakota, Oklahoma and South Carolina In Support of Writ of Certiorari to the Supreme Court of Kansas

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INTEREST OF AMICUS CURIAE

This case addresses a key question with regard to the scope and constitutionality of a statute that "unambiguously requires a finding of dangerousness either to oneself or to others." *Kansas v. Hendricks*, 521 U.S. 246, 357 (1997). Directly or indirectly, it affects all fifty states.

Some amici are attorneys general in states that have laws addressing the treatment of sexually violent predators that are similar to the Kansas statute upheld in *Hendricks* and at issue here. Each uses those laws to ensure both public protection and personal treatment by placing the sexually violent predator in a secure mental health facility for treatment. He remains there until his condition is sufficiently controlled that he is no longer likely to commit violent sexual acts. Though the laws do not all precisely parallel the one at issue in this case, they all contain language that can raise the issue that was decided by the Kansas Supreme Court as a matter of federal, not state constitutional law. In fact, many of these states are now facing claims by alleged sexually violent predators based on the holding in this case. In the absence of a finding that they *can*not control their actions (instead of merely *will* not or *find it difficult to* control them), alleged predators argue that they cannot constitutionally be compelled to engage in the treatment that the sexually violent predator laws require.

All amici are attorneys general in states to which sexually violent predators could, if prematurely released, relocate without the treatment that laws such as the one at issue were designed to ensure. State lines do not limit a predator's ability to offend again. The situation of Crane, who is likely to commit future acts of sexual violence (Petitioner's Appendix ("Pet. App.") at 3a, 25a), demonstrates the seriousness of the problem. Crane can easily cross the street between Kansas City, Kansas, and Kansas City, Missouri, or travel Interstate 35 south into Oklahoma before he offends again. The attorneys general represent the public's concern with the threat posed by Crane and others who, despite some ability to control their behavior, will continue to pose a threat to public safety if they are released without successful treatment.

REASONS FOR GRANTING THE WRIT

In *Kansas v. Hendricks*, this Court upheld the Kansas statute providing for the treatment of sexually violent predators in secure facilities – thus ensuring both protection of the public and proper treatment of the predator. The Kansas Supreme Court's decision at issue here, particularly when contrasted with decisions in other states, creates a significant problem with regard to the interpretation and enforcement of those laws. If the Kansas court is right, then there are persons in custodial treatment in other states who have been detained on an unconstitutional premise. If the Kansas court is wrong, then persons have been released in Kansas who are likely to commit future violent sexual offenses, and who merit treatment under the law upheld in *Hendricks*. Leaving either condition in place awaiting the unlikely uniform resolution of the conflict in state or lower federal courts is inherently unfair to those whose liberty or whose safety is erroneously threatened.

The Kansas Supreme Court is not the first to delve into the realms of volitional impairment. Indeed, the question of whether the states' laws addressing custodial treatment of sexually violent predators must require a finding of volitional impairment has been posed elsewhere – and has been answered in ways that cannot be reconciled with the one given here by the Kansas Supreme Court.[1] Those differences cannot be explained by differences in statutory language, nor by reference to this Court's existing precedents.

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[1] *See, e.g., In re Linehan*, 594 N.W.2d 867, 875-76 (Minn. 1999), *cert. denied sub nom. Linehan v. Minnesota*, 120 S.Ct. 587 (1999); *In re Brooks*, 973 P.2d 486, 492 (Wash. App. 1999); *In re Varner*, 734 N.E.2d 226, 235-36 (Ill. App. 2000); *People v. Hatfield*, 80 Cal. Rptr. 268, 282 (Cal. App. 1998).

Even the Kansas Supreme Court recognized that the answer to the volitional impairment question is not found in the statutes. The Kansas law contains no requirement of proof of volitional capacity. *See* Petitioner's Appendix at 9a. The same is true of other predator laws, which often share Kansas's extension of treatment to those whose "mental abnormalities" are conditions that affect "*emotional or* volitional capacity." *E.g.*, Mo. Rev. Stat. § 632.480(2) (2000); Cal. Welf. & Inst. Code § 6600, subd. (c) (2000). Statutory construction is thus unavailable to restrict the laws' coverage to those with deficient volitional capacity, for to do so would render the "emotional" option meaningless. The Kansas court instead based its holding on its reading of federal constitutional law.

That holding is neither found in nor compelled by any prior decision of this Court. The Kansas court cited this Court's opinions in *Hendrick* to support its conclusion. But the holding in that case is not on point. Its impact on the question posed here is, at most, ambiguous. Though another case currently before this Court, *Selig v. Young*, No. 99-1185 (argued Oct. 31, 2000), also addresses sexually violent predator statutes, it, too, does so in a context that avoids resolution of the issue the Kansas decision raises.

Only this Court can definitively resolve both the ambiguity made evident by the Kansas court's reading of *Hendricks* and the conflict that the Kansas decision creates. Only this Court can give state judges the guidance that they require as they make critical decisions affecting both individual liberty and public safety. And only this Court can give alleged predators sure knowledge of the scope of their constitutional rights. Until this court speaks, judges throughout the country will continue to reach inconsistent conclusions as to a constitutional question. Alleged predators and potential victims will continue to benefit or suffer from that inconsistency.

Certainly the question will not go away on its own. It has been raised or can be expected to be raised shortly in every one of the sixteen states with laws regarding involuntary treatment of sexually violent predators. Answering it will be particularly problematic in states that have short deadlines. For example, in many states, a trial judge is required to quickly decide whether there is probable cause to believe that the person is a sexually violent predator – a mandate for speed intended to protect the alleged predator from unnecessary confinement. Judges in those states must make that probable cause decision within 72 hours of detention.[2] At that point, the judge either places the person in custody for evaluation, or releases him. The state's legal or practical ability to appeal or to detain the person pending appeal may be problematic.[3] Once the person is released, it may be impossible or impractical to return him to custody – at least before he is found having committed another offense. On the other hand, a person's liberty is already being taken even during the examination period. Our aversion to improper detention, the public pressure for protection against the threat of sexual violence, and short deadlines combine to make clear legal rules essential.

Despite the need for clear and consistent rules, under most circumstances the amici would be quite willing to wait

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[2] *See* Mo. Rev. Stat. § 632.489.2 (2000); Ariz. Rev. State. § 36-3705(D) (2000); 725 Ill. Comp. Stat. § 207/30(b) (2000); Iowa Code § 229A.5.2 (1999); Kansas Stat. Ann. § 59-29a05(b) (1999); N.D. Cent. Code § 25-03.3-11 (2000); S.C. Code Ann. § 44-48-80 (1999); Wash. Rev. Code § 71.09.04(2) (2000); Wis. Stat. § 980.04(2) (1999).

[3] *See In re Care and Treatment of Salcedo*, 2001 Mo. App. LEXIS 11 (Mo. Ct. App. S.D. 2001), in which the court held that there is not appeal at the probable cause stage.

and litigate that issue in their own courts – hoping, in their role as protectors of public safety, for a conclusion contrary to that reached in Kansas. But the high stakes on both sides ensure that the dispute will be raised forcefully and repeatedly. And the conflict among the courts ensures that even now there is someone who has been either confined or released based on an erroneous rule. To the amici, leaving that situation unresolved any longer than necessary is intolerable.

CONCLUSION

For the reasons stated above, the Court should grant the petition and consider whether the states' "sexually violent predator" laws must be limited to instances where the state proves that alleged predator cannot, rather than merely will not, refrain from committing violent sexual offenses.

Respectfully submitted,

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(9)

Supreme Court, U.S.
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No. 00-957

In The

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

MICHAEL T. CRANE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Kansas

JOINT APPENDIX

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12/12/97 12/11/97 – PETITION (60) SEXUAL PREDATOR: ATTACHMENT AND MOTION FOR PROBABLE CAUSE HEARING FILED.

12/12/97 12/12/97 – (KH) PLF, STATE OF KANSAS APPEARS BY S. TOTH AND B. CAMERON; DEF. MICHAEL CRANE APPEARS BY JOHN DONHAM; DEF. MOTION TO CONTINUE PROBABLE CAUSE HEARING SUSTAINED PER RECORD; HEARING SET 1/28/98, 2:30 P.M. (CSR) MELANIE JONES JUDGE P. RUDDICK

* * *

02/02/98 01/28/98 – (SK) STATE APPEARS BY SCOTT TOTH AND BRENDA CAMERON. DEFENDANT'S MOTION TO PROHIBIT DISCLOSURE AND CLOSE HEARING DENIED DEFENDANT'S MOTION TO DISMISS DENIED (LACK OF PERSONAL SERVICE). DEFENDANT'S MOTION FOR SUMMARY JUDMENT (DEFENDANT ALREADY PAROLED) IS UNDER ADVISEMENT PENDING FILING OF BRIEFS. DEFENDANT'S MOTION TO DISMISS (DOUBLE JEOPARDY AND EX POST FACTO) DENIED. DEFENDANT'S MOTION TO BAR USE OF PRIOR CONVICTIONS DUE TO RES JUDICATA FINDING OF INTENT DENIED. STATE PRESENTS EVIDENCE AND RESTS. DEFENDANT PRESENTS NO EVIDENCE. TRIAL SET MAR 30, 1998 FOR 5 DAYS. MOTIONS

SET MARCH 4, 1998 AT 11:30 A.M. (CSR) MT JUDGE RUDDICK

02/06/98 02/04/98 – (BW) MOTION TO PROHIBIT DISCLOSURE OF PRIOR CRIMINAL CONVICTIONS

* * *

02/17/98 02/12/98 – (BW) MOTION FOR SUMMARY JUDGMENT . . . MOTION FOR REASONS FOR DECISIONS

02/20/98 02/18/98 – (LK) STATE'S RESPONSE TO RESPONDENT'S MOTION TO PROHIBIT DISCLOSURE OF PRIOR CRIMINAL CONVICTIONS . . . STATE'S RESPONSE TO RESPONDENT'S MOTION TO ALLOW INDIVIDUAL VOIR DIRE . . . STATE'S RESPONSE TO RESPONDENT'S DEMANT [sic] FOR CONFIDENTIALITY . . . STATE'S RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

02/26/98 02/24/98 – (LK) * 812 *
MOTION TO DISMISS ON CONSTITUTIONAL GROUNDS . . . NOTICE OF HEARING 3-26-98 AT 10:30

03/02/98 02/25/98 – (SK) STATE OF KANSAS APPEARS BY COUNSEL, SCOTT TOTH AND BRENDA CAMERON DEFENDANT CRANE APPEARS BY COUNSEL, JOHN DONHAM. MR. CRANE'S PERSONAL APPEARANCE IS WAIVED DEFENDANTS MOTION TO DENY TESTIMONY UNDER ADVISEMENT. DEFENDANT'S MOTION TO LIMIT (DIAGNOSIS BY OTHERS) IS UNDER ADVISEMENT. DEFENDANTS MOTION TO LIMIT (OPINION AS TO RE-OFFENSE) IS DENIED. DEFENDANT'S MOTION TO LIMIT (KSA

60-457) IS UNDER ADVISEMENT PENDING DISCOVERY PER RECORD. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DENIED PER RECORD. DEFENDANT'S MOTION TO PROHIBIT DISCLOSURE OF CONVICTIONS IS DENIED. DEFENDANT'S OBJECTION TO FEE AND EXPENSE CAPS DENIED, IN PART, PER RECORD. DEFENDANT'S MOTION FOR INDIVIDUAL VOIR DIRE IS DENIED. NEXT HEARING SET MARCH 26, 1998 AT 10:30 A.M. (CSR) MJ JUDGE RUDDICK

* * *

03/16/98 03/09/98 – (BW) MOTION FOR SUMMARY JUDGMENT

* * *

03/27/98 03/24/98 – (LK) STATE'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS ON CONSTITUTIONAL GROUNDS . . . NOTICE OF HEARING 3-26-98 AT 10:30 CERT. OF DELIVERY

* * *

03/30/98 03/25/98 – (LK) STATE'S RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT . . . NOTICE OF HEARING 3-26-98 AT 10:30, CERTIFICATE OF DELIVERY

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CONTINUED AT DEFENDANT'S MOTION. TENTATIVE TRIAL DATE IS JULY 13, 1998 AT 8:30 A.M. JUDGE RUDDICK

* * *

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* * *

07/15/98 FILE STAMP 07/13/98, MICR #00932, MOTION TO DENY EVIDENCE OF NON-SEXUAL CRIMES. . . . MOTION FOR SUMMARY JUDGMENT (NON-QUALIFYING DISORDER)

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* * *

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* * *

10/04/00 FILE STAMP 10/03/00, FILM DATE 10/03/00 MICR #595, MANDATE FROM COURT OF APPEALS FILED/ REVERSED AND REMANDED (C/S TO JUDGE RUDDICK)

* * *

CIVIL ACTION

IN THE DISTRICT COURT FOR THE
TENTH JUDICIAL DISTRICT OF KANSAS
JOHNSON COUNTY, KANSAS

State of Kansas	)	
	)	
Plaintiff-Appellant	)	Case No. 97C16409
vs	)	Appellate Ct.
	)	No. 98-82080-A
Michael Crane	)	
	)	
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CIVIL ACTION

IN THE DISTRICT COURT FOR THE TENTH JUDICIAL DISTRICT OF KANSAS JOHNSON COUNTY, KANSAS

Case No. 97C16409
Appellate Ct. No. 98-82080-A

[Caption Omitted In Printing]

REPORT TO COURT OF EVALUATION PURSUANT TO K.S.A. 59-29a01, ET SEQ.
(SEXUAL PREDATOR ACT)

CRANE, Michael Todd
#34,862 DC (97-C-16409) **March 2, 1998**

Michael Todd Crane was admitted to State Security Hospital on February 4, 1998, by order of the District Court of Johnson County. He was to be evaluated as to whether he is a sexually violent predator as defined in the Sexual Predator Act (K.S.A. 59-29a01, et seq.).

ASSESSMENT PROCEDURES UTILIZED

Data Sources for this evaluation included interview information, observation of behaviors, and review of State Security Hospital medical records inclusive of court papers and numerous other documents sent by the Kansas Department of Corrections, as well as a Clinical Services Report for Commitment Review Committee (prepared December 10, 1997).

CURRENT CASE INFORMATION

One criterion necessary to qualify as a sexually violent predator is that the person "has been convicted of or charged with a sexually violent offense." Mr. Crane meets that criterion as he stands convicted of Aggravated Sexual Battery in case number 93-CR-28 and Lewd and Lascivious Behavior (a misdemeanor).

According to the Clinical Services Report, these offenses took the following form:

> In 1993, Mr. Crane was sentenced to 35 years to life for Kidnapping, Attempted Aggravated Sodomy, Attempted Rape, and Lewd and Lascivious Behavior (misdemeanor). The Kansas Supreme Court reversed these felony charges in July, 1996, leaving the Lewd and Lascivious Behavior as a misdemeanor. Johnson County then refiled charges, and Mr. Crane subsequently pled guilty to Aggravated Sexual Battery and was given a 3 to 10 year sentence. The victim in his Lewd and Lascivious Behavior conviction was an adult female employee at a tanning salon. The offending behavior consisted of exposing himself to this woman. The Aggravated Sexual Battery conviction was associated with a female employee of a video store. Mr. Crane had apparently carried the victim to the back of the store, told her to engage in fellatio, and threatened to rape her.

CRIMINAL HISTORY INCLUDING OTHER SEX OFFENSES

The following is a composite listing obtained from reports from various law enforcement agencies:

- In 1979, Mr. Crane was convicted of Trespassing.
- In August of 1980, he was arrested for Third Degree Property Damage, but no final disposition was indicated.
- In September of 1981, he was arrested for Second Degree Burglary and sentenced to one year in the county jail.
- In 1983, he was arrested for Burglary in Atchison, Kansas, given a one to five years sentence that was suspended, and he was placed on probation for three years.
- In 1983, he was convicted of Resisting Police.
- In September of 1984, he was charged with Felony Theft.
- In January of 1985, he was convicted on three counts of Felony Theft in Wyandotte County, Kansas.
- In February of 1985, he was charged with Indecent Exposure. His 21-year-old female victim observed him masturbating.
- In January of 1986, he was charged with the theft of construction forms and other materials. This case was not prosecuted.
- In October of 1986, he was charged with Sexual Assault in Blue Springs, Missouri. In this case, he pushed his 27-year-old female victim into her car, pushed his hand against her face, and said, "You know what I want." He began stroking her thighs and crotch, but the victim's 3-year-old son (who was in the car) began crying, evidently distracting Mr. Crane until he said, "This is crazy – I've been

drinking. I'm not going to hurt you. I [sic] going to leave you and you won't see me again." He left the vehicle and ran away.

- In December of 1986, he was charged in Jackson County, Missouri, Circuit Court with one count of Felony Attempted Forcible Rape and two counts of Felony Sexual Abuse in the First Degree for offenses committed on October 16, 1986, and December 12, 1986. In the latter offense, he grabbed his 28-year-old victim from the front by her arms, forced her to the ground, laid on top of her, and tore her sweater while trying to fondle her breasts. For some reason unknown to the victim, Mr. Crane suddenly got up and fled the scene. Approximately twenty-four minutes after the offense, Mr. Crane was arrested. He informed officers that he did not know why he had pulled into the parking lot, but that he "saw this lady, she got out of her car. All I intended to do was just scare her. I didn't intend to hurt anybody. That's all, I wasn't going to rape her." He further told officers that he had used a "camouflage hat" as a mask. He admitted touching the victim, said that he was alone during the assault, and that the victim yelled. He said that he didn't know beforehand that he was going to grab her, but "just played a mind game". He admitted playing this kind of "game" before, but evaded a question as to how many times, saying, "Never to where I grabbed or hurt somebody." One day later, at the time of his admission to Two Rivers Hospital, he claimed a lack of memory for any of these events. After plea negotiations, Mr. Crane

was convicted on two counts of Sexual Abuse in the First Degree.

- In February of 1988, he was charged with Indecent Exposure in Independence, Missouri. His female victim said that she was driving out of a parking lot when she observed Mr. Crane masturbating in a parked pickup while the driver's door was open. When Mr. Crane was stopped for a "good car check" a short time later, he denied any awareness of the offense and he was released after the victim could not be contacted to provide identification.
- In October of 1988, he was charged with Assault in the Third Degree in Grandview, Missouri. At 10:20 a.m., Mr. Crane's 21-year-old victim was riding her bicycle on a bike trial when he lunged toward her from the front, knocking her off of her bicycle. He pushed her head against the ground and said, "Shut up!", and attempted to cover her mouth with her hand. When another biker approached, the victim yelled and Mr. Crane ran to his vehicle and drove away at a high rate of speed.
- In June of 1989, he was charged with Interference with Lawful Arrest. He was released on bond and was later charged with Failure to Appear.
- In September of 1989, he was charged in Blue Springs, Missouri, with Battery, which was later amended to Assault in the Third Degree. He had approached his estranged wife during a class reunion at a lounge because he was upset at seeing her with two other males. An argument ensued and he

prevented her from leaving by striking her in the face and knocking her to the ground. When one of the other men objected, Mr. Crane attempted to start a fight with him, but was restrained by a lounge employee.

- In May of 1990, he was charged in Blue Springs, Missouri, with Failure to Comply with General Duties of an Owner of an Animal. (The police report noted that Mr. Crane had been convicted of the same offense several times during the previous six years.)

- In February of 1991, Mr. Crane was charged in Blue Springs, Missouri, with Abuse of a Child. Mr. Crane's estranged wife reported that he had taken her 3-year-old son (with permission), but had returned him to her with a bruised face and broken blood vessel in the right eye.

- In August of 1992, he was charged with Indecent Exposure in Independence, Missouri. At about 4:10 p.m., his female victim, a probation officer, appeared at the police department to report that she had observed Mr. Crane, who she knew as a parolee, exposing himself in a parking lot. Mr. Crane did not recognize her at first, but when she approached and he saw who she was, he said, "Oh shit!", and left the parking garage.

These accounts of Mr. Crane's aggression toward women appear not always to have been adjudicated as fact.

TREATMENT

A cautionary comment by Dr. Wagih Silwance, a forensic psychiatrist at Western Missouri Mental Health Center, stated that Mr. Crane "presents a likelihood of repeating the same acts unless changes in his personality structure took place".

While incarcerated, Mr. Crane completed thirty hours of group therapy in 1995. The treatment summary indicated that he was an active group participant, but he excluded discussions of his sexual and criminal behavior. Mr. Crane has never participated in sex offender treatment.

PSYCHIATRIC EXAMINATION

On admission, Mr. Crane expressed concerns about the patient/physician confidentiality. He was advised that his evaluation would not be confidential, but would result in a report to the court, with copies to his attorney and the district attorney. He was advised that his medical records would be reviewed and important information would be included in the report. He voluntarily gave pertinent information about himself as well as the circumstances leading to his convictions and incarceration.

Mr. Crane reported that in 1993 he was at State Security Hospital for an evaluation, after which he was convicted of Kidnapping, Attempted Rape, and Sodomy. He was sent to Lansing Correctional Facility. After appealing the convictions, Mr. Crane accepted a plea bargain from Johnson County and pled guilty to Aggravated Sexual Battery. He was paroled in early January,

1998, and after six days, he was ordered to State Security Hospital for a sexual predator evaluation.

Mr. Crane further reported that he has been intermittently exposing himself since age 16. He exposed himself to strangers in parking lots of shopping centers. His exhibitionism allegedly became less frequent as he became older.

Throughout the evaluation course of Mr. Crane, he did not show evidence of overt psychosis nor affective symptoms.

On formal mental status examination, Mr. Crane presents as a polite and cooperative individual, who is neat and attentive to his personal hygiene, and appearing his stated age of 36. His mood is neutral. His affect is appropriate. Although he is pleasant and friendly, he appears ill-at-ease. His speech is clear. His responses are logical and organized. He expressed remorse for his deviant sexual behavior. Likewise, he is quite concerned for the embarrassment that he caused his family. He reports having gained a new perspective on life and considers his prison experience as a motivating factor toward his rehabilitation. His immediate recall and memory for both recent and remote events are intact. His sensorium is clear as he is oriented to time, place, person, and situation. He is articulate and his level of functioning is assessed to be average. His abstract reasoning ability is intact. He is not preoccupied with delusions. Hallucinatory behavior is not evident. He is able to verbalize some insight into his behavior; however, he seems to minimize the seriousness of his illegal behavior. He denies suicidal and homicidal ideations.

DIAGNOSIS

Upon review of all available data, it is the opinion of these examiners that Mr. Crane meets the Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition (DSM-IV) criteria for Exhibitionism and Antisocial Personality Disorder.

OPINION

Under the Sexual Predator Act, to-wit: K.S.A. 59-29a01, et seq., "sexually violent predator" is legally defined as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence".

According to the documents forwarded to these examiners, Mr. Crane meets the criterion regarding having been convicted of a sexually violent offense. These convictions have been discussed in the section "Current Case Information" above.

According to K.S.A. 59-29a01, et seq., "mental abnormality" means "a congenital or acquired condition affecting the emotional or volitional capacity in a degree constituting such a person a menace to the health and safety of others". It is the opinion of the evaluating staff that Mr. Crane possesses a mental abnormality, Antisocial Personality Disorder, which would account for his aggression toward women. In Antisocial Personality Disorder, there is a pervasive pattern of disregard for and violation of the rights of others, impulsivity, irritability,

and aggressiveness, along with a lack of remorse as indicated by rationalizing having hurt/mistreated others. This aggression has been sexual in that it has proceeded progressively from his exhibitionistic behavior.

If the "sexual offenses" listed above in the Criminal History section are true, Mr. Crane is then considered to be a sexually violent predator. If that information is not true and we are left to consider only the offense described in the Current Case Information section above, Mr. Crane then does not meet the criterion of a sexually violent predator.

CONSIDERATION/RECOMMENDATIONS

It is understood by the staff that should legal authorities (prosecution, courts, jury, etc.) find that Mr. Crane is not a sexually violent predator, he will be released into open society on parole status. Since it is assumed that some risk for reoffense remains, it is important that Mr. Crane adhere to a strict parole plan. Besides usual parole stipulations, he should be required to participate in outpatient therapy with a therapist who is knowledgeable of sex offenders, sex offender treatment, and relapse prevention. His therapist and parole officer should keep in close contact to attempt to assure that Mr. Crane is complying with parole stipulations and his relapse prevention plan.

/s/ Ken Eaves
Ken Eaves, M.S., LMLP
Psychologist

/s/ [Illegible]
Leonardo B. Mabugat, M.D.
Psychiatrist

CIVIL ACTION

IN THE DISTRICT COURT FOR THE
TENTH JUDICIAL DISTRICT OF KANSAS
JOHNSON COUNTY, KANSAS

Case No. 97C16409
Appellate Ct. No. 98-82080-A

[Caption Omitted In Printing]

* * *

[412] THE COURT: I think we're ready. Is there anything else before we bring the jury in?

MR. TOTH: No, sir.

MR. DONHAM: No.

THE COURT: All right. Thank you.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

THE COURT: Call your next witness.

MR. TOTH: Thank you, Your Honor.

ROBERT HUERTER,

called as a witness on behalf of the Petitioner, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TOTH:

Q. Would you state your name, please.

A. Robert Huerter.

Q. Mr. Huerter, what is your occupation?

A. I'm a licensed master's level psychologist.

[413] Q. Who are you employed by?

A. Larned State Security Hospital in Larned, Kansas.

Q. What is Larned State Security Hospital?

A. It's a maximum security psychiatric facility that serves all 105 counties of the state for people who are referred for care and treatment and/or evaluation from all of the counties of the state.

Q. Okay. What is a licensed master's level psychologist?

A. It's an individual with a master's degree in a psychology-related area who has been recognized by the Kansas Behavioral Scientist Regulatory Board to practice psychology within an institutional setting, a mental health setting, or to work for a medical doctor.

Q. All right.

MR. DONHAM: Judge, I'm sorry, I'm going to ask the witness to speak up slightly. I'm having a little difficulty hearing.

THE COURT: All right. Can you try to speak up for us?

THE WITNESS: Okay.

Q. (By Mr. Toth) Mr. Huerter, how long have you been a licensed master's level psychologist for the State of Kansas?

[414] A. Since 1989.

Q. And have you been employed full time since 1989 with the Larned State Security Hospital?

A. Yes, I have.

Q. Okay. Would you explain to the jury, please, your educational background?

A. Okay. I have a bachelor's degree from Emporia State University which I got in 1970 and a master's degree from Pittsburg State University which I received in 1975.

Q. Because of your designation, licensed master's level psychologist, does the Kansas Behavioral Science Regulatory Board authorize you to make diagnosis regarding a patient's psychological profile?

A. I'm entitled to administer and interpret psychological tests, and the State of Kansas through the hospital has given me the clinical privilege of making diagnoses or making diagnostic impressions, yes.

Q. Okay. Can you still try to speak up a little bit more?

A. Sorry.

Q. Does this license that you hold not only provide you the ability to legally give out diagnosis, but [415] can you also engage in treatment if you chose to go to that avenue?

A. Yes, I can, within the hospital setting. I cannot do that independently.

Q. Okay. Mr. Huerter, presently which unit of Larned State Hospital are you assigned to?

A. I'm on East 2 Ward, which is an evaluation unit.

Q. What happens at an evaluation unit?

A. A – we receive people from the different counties across the state and evaluate them in reference to issues of competency to stand trial. We do sanity evaluations, presentence evaluations.

Q. You've been a psychologist for how long, how many years?

A. Twenty-three.

Q. Okay. And do you keep current in the literature in the area of psychology?

A. Make an effort to, yes.

Q. Okay. Are you the member of any professional organizations involved in the area of psychology?

A. I'm a member of the North American Master's Level Psychologist Association.

Q. Okay. Any others?

A. That's all.

Q. All right. Have you ever testified, Mr. Huerter, [416] as an expert in the area of making a psychological diagnosis of an individual before?

A. Yes, I have.

Q. Okay. Where have you testified at?

A. In this very courthouse and in many of the counties across the state.

Q. Approximately how many times have you testified as an expert with regard to your findings of a diagnosis that you've made?

A. Oh, probably five or six times a year.

Q. Okay. Over the course of the many years you've been a psychologist?

A. Yes.

Q. Are you familiar, Mr. Huerter, with what – I'm going to call it a M'Naghten evaluation. Are you familiar with what that is when I say a M'Naghten evaluation?

A. Yes, I am.

Q. Would you tell the jury what a M'Naghten evaluation is?

A. Okay. A M'Naghten evaluation is an assessment of an individual's mental state at s me point in the past to determine if, No. 1, it's at the time of an alleged criminal offense, if – to determine if, No. 1, the individual was experiencing some [417] type of defect of reason due to disease of the mind; in other words, a major mental illness so as to have rendered them, No. 2, unable to differentiate the difference between right and wrong, or if so, if they could differentiate between right and wrong, to be unable to assess the nature and quality of their behaviors.

Q. Okay. So – and I have heard that referred to as an insanity evaluation before. Would that be kind of along those same lines?

A. Yes. It is a specific type of sanity evaluation. It's a standard that Kansas uses.

Q. Okay. And have you performed M'Naghten evaluations in the past?

A. Yes, I have.

Q. Approximately how many do you believe?

A. Oh, maybe 15, 20 a year.

Q. All right. How is an evaluation like that conducted?

A. Okay. Since you are reconstructing a psychological profile of somebody at some point in the past, you want all records that you can get, previous police reports, a person's psychiatric records, all police reports describing the crime, any witness statements, any victim statements, [418] anything that would add some credence to that individual's state of mind at the time of this alleged criminal offense.

You go through this stuff, all this data. You then interview and you psychologically test the individual, and after you have these data, you go through to determine, as I mentioned earlier, if in fact you felt the person had a major mental illness, in other words, a disease of the mind, and if they did, were they unable to differentiate between right and wrong, or were they able to assess the quality of their behavior.

And if they were unable to – if they possessed the major mental illness and they were unable to differentiate between right and wrong, you report that they were a positive M'Naghten and thus perhaps subject to being acquitted by reason of insanity.

Q. Okay. Does the evaluation also generally include a personal interview of the subject?

A. Yes, it does.

Q. Okay. And do you administer testing as well?

A. Yes, I do.

Q. All right. And are you familiar with – is the testing that you do in a M'Naghten evaluation [419] generally accepted in your field as reliable?

A. Yes, it is.

Q. Okay. Did you conduct a M'Naghten evaluation on Michael Crane back in 1993?

A. Yes, I did.

Q. Okay. Is this Mr. Crane seated over here to my right?

A. Yes, it is.

Q. All right. Do you remember Mr. Crane?

A. Yes, I do.

Q. All right. Are you aware that at the time that you saw Mr. Crane he had been charged in Johnson County District Court with a kidnapping and attempted rape and attempted sodomy?

A. I believe those were the charges. I know he had felony charges similar to that.

Q. All right. And at the time that – at the time that you saw Mr. Crane, that case was still pending, correct?

A. Yes.

Q. All right. He would have been sent to you for determination by you as to whether or not he was insane at the time he committed the offense, correct?

A. Yes, he was.

[420] Q. All right. Did you try to assimilate Mr. Crane's prior criminal history as best you could?

A. Yes, I did. I should mention this is a team effort. The social worker is in part responsible for contacting other social agencies, so the social worker accumulates much of this information. Then I go through that data.

Q. Okay. And that data you go through with the proposed patient, correct?

A. Yes, I do.

Q. All right. Do you also or did you in this case have a personal interview with Mr. Crane about this offense?

A. Yes, I – on a number of occasions.

Q. Okay. What type of tests did you administer to Mr. Crane?

A. I gave Mr. Crane a Minnesota Multiphasic Personality Inventory, a Millon Clinical Multiaxial Inventory, a Bender Motor Gestalt, a memory for designs test, a Wechsler Adult Intelligence Test. Those were the formal tests that I administered, had administered.

Q. And you're familiar with how to administer those tests?

A. Yes, I am.

[421] Q. And you had administered those tests on a number of occasions prior to administering them to Mr. Crane?

A. Yes, I have.

Q. And would the purpose of those tests be to help you determine whether or not there was any sort of organic brain dysfunction?

A. Yes.

Q. Okay. Are you aware that Mr. Crane had claimed that he was in a blackout state at the time that he committed the offense in the Leawood Movie Exchange?

A. Yes.

Q. Okay. Would you describe your interaction with Mr. Crane, please?

A. Okay. As I mentioned, I did interview him on several – on numerous occasions. My office is actually located on the ward, so Mr. Crane had access to my office area. On a number of occasions, he made an effort to initiate contact with me by coming to my office to knock on the door to ask to speak with me, to let me know that he wanted to explain his side of the story and to get going with the evaluation to convince me of his – of what was going on with him, of his [422] problems, to basically let his side be known.

Q. What did he tell you was his side of it he wanted to reinforce to you was – what was going on with him?

A. Primarily that he was in a blackout state, and that he had no recollection of the events for which he was currently charged.

Q. Okay. How – how many times did Mr. Crane reemphasize that with you?

A. Probably two or three times a week.

Q. Okay. How would you characterize Mr. Crane?

A. Well, it got to be rather bothersome after a while. Usually I'm the one who initiates the contact with the patients. I tell them that if they're experiencing acute emotional distress on their day-to-day living there on the ward, to come and see me. Otherwise, I'll let them know when I'm ready for the testing and the interviewing process.

Q. Okay. Was that the way with Mr. Crane?

A. He wasn't – he was concerned and anxious more so about his legal situation than anything that was occurring on the ward.

Q. I see. Did you interview Mr. Crane about the incident in 1993, then, over the course of your [423] contact with him?

A. Yes, I did.

Q. Okay. Can you tell us what Mr. Crane advised you about that?

A. He was able to provide a fairly logical and sequential account of his activities before and after the event and actually even during the time period, saying that he didn't remember this himself, but having been

told and having read police reports, and from what his attorney had told him or whatever information he gathered elsewhere, he had a pretty good account of what he supposedly did, although he stated he could not consciously remember the actual actions which resulted in the legal charges.

Q. Okay. But did he provide to you a fairly detailed account of what happened?

A. Yes, he did.

Q. All right. And would that be inconsistent with an individual who was suffering from blackouts?

A. Individuals who are experiencing blackouts, sometimes there is a – they may have a very logical sort of an account as to what's going on around them up to a point in which they do black out, and then at such point as they do tune in [424] again, there's this period of loss in which obviously they do not remember what has gone on. So it wasn't totally out of character for someone who may have had some type of a blackout state.

Q. Okay. Did you provide – do testing – you said you did a number of tests on Mr. Crane to help try to get a better feel as to whether or not something had happened at the time the offense occurred, correct?

A. Yes.

Q. All right. Did any of your testing indicate that?

A. No, it did not.

Q. Okay. So based on your interview with Mr. Crane, and combined with the testing that you did with

Mr. Crane, did you reach some sort of conclusion as to whether or not in your opinion Mr. Crane was in any sort of blackout state at the time that this offense occurred?

A. Yes, I did.

Q. And what was that opinion?

A. In view of his previous criminal record, his previous psychiatric record, the test results, my interviews with him, I was of the impression quite strongly that he was not in a blackout state during the time of the alleged criminal offenses.

[425] Q. Okay. During your interview with Mr. Crane – just one or two final points – did you talk to him about his prior incidents of sexually impulsive behavior?

A. Yes, I did.

Q. Okay. Did he give you a logical explanation as to why he committed those acts in the past?

A. I know at one point I'd asked him about it, and he kind of passed it off to youthful indiscretion and peer pressure and seemingly was using that as an excuse as to why he did some of the things that he had done and been arrested for.

Q. Okay. The opinion that you reached regarding Mr. Crane, was that shared by the other members of your team that worked on this case?

A. Yes, it was.

Q. Okay.

MR. TOTH: Nothing further.

THE COURT: Mr. Donham, cross?

CROSS-EXAMINATION

BY MR. DONHAM:

Q. Mr. Huerter, if I understand your diagnosis of Mr. Crane back in 1993, then, you found that he did not have any type of mental disorder that would have affected his ability to understand what [426] he was doing?

A. Correct.

Q. Now, you also said that you conducted a personal interview of Mr. Crane. Is there some reason why you wanted to have a personal interview of him?

A. It's just part of my – the standard procedure for which I reach my conclusions.

Q. Couldn't you have just done that by reading other documentation and medical reports?

A. I do that as part of a preface in most cases so that I do have a good background and a good grasp as to what the person's historical psychological dynamics may be, but I need to question the person so as to rule in or rule out – there are certain questions that will arise by which you want – certainly want to give the person the benefit of the doubt as to whether they were or were not experiencing a lack of mental state.

Q. So you think that his allegations that he didn't understand what he was doing at the time was just some excuse that he was throwing up in an attempt to avoid prosecution?

A. That coupled with his history of antisocial behaviors, his criminal record, his previous evaluation in which he'd been given – he'd been [427] previously evaluated for sanity in the past and had not been seen as legally insane develops a pattern of sorts consistent with that of an antisocial individual, yes.

Q. Antisocial individual, that being one of like 3 percent of the general male population in the United States?

A. I can't give you the exact percentage, but I could probably check for you.

Q. I believe it's in the DSM-IV under Antisocial Personality Disorder. Page 648.

A. Okay. Prevalence. Estimates within the clinical setting are varied from 3 to 30 percent depending upon the predominant characteristics of the population being sampled.

Q. There is nothing particularly unusual about somebody with an antipersonality – excuse me, antisocial personality disorder, is there?

A. Not –

MR. TOTH: Your Honor, I'm going to – I'm sorry to interrupt, Mr. Donham. May we approach just a second, Judge?

THE COURT: Sure. Come on up.

* * *

CIVIL ACTION

IN THE DISTRICT COURT FOR THE
TENTH JUDICIAL DISTRICT OF KANSAS
JOHNSON COUNTY, KANSAS

Case No. 97C16409
Appellate Ct. No. 98-82080-A

[Caption Omitted In Printing]

[430] DIRECT EXAMINATION

BY MR. TOTH:

Q. Would you state your name, please.

A. Leonardo Mabugat.

Q. You are a medical doctor, correct, sir?

A. That's correct.

Q. Doctor Mabugat, what is your present occupation?

A. My specialty in the field of medicine is psychiatry.

Q. All right. Where are you employed at?

A. I'm currently employed at the Larned State Security Hospital.

Q. What is the Larned State Security Hospital?

A. It is a state facility responsible for doing evaluation and/or treatment of patients sent there by the court.

Q. All right. You are a psychiatrist, correct?

A. That's correct.

Q. Doctor Mabugat, would you tell the jury your educational background, please?

A. After finishing my undergraduate courses of Bachelor of Arts, major in pre-medical course, and Bachelor of Science in psychology, I went into medical education proper. After completing my one year of rotating internship at the V. Luna General [431] Hospital –

Q. Where's that at?

A. It is located in Quezon City, Philippines.

Q. You are –

A. I graduate –

Q. I'm sorry. You are originally from the Philippines, Dr. Mabugat?

A. Yes, I am.

Q. So you started your rotating internship at the V. Luna Hospital in Quezon City?

A. Quezon city, that's correct.

Q. After that what did you do?

A. After finishing my rotating internship, I graduated with a degree of Doctor of Medicine from the University of Santo Tomas in Manila, Philippines.

Q. Okay.

A. After –

Q. I'm sorry. I'm just going to let you go ahead.

A. After graduating from medicine, I reviewed for six months in preparation for the board examination

there. After six months of review and preparation, I underwent one and a half years of training, residency training in general practice, which is a requirement for all physicians [432] undergoing training in our country before they go into different fields of specialty in the field of medicine. So after completing a year and a half of residency training in general practice, I underwent training in internal medicine, and I finished the training in internal medicine in the Philippines in 1972.

Q. Okay.

A. A few months after I finished my training in 1972, I went to the United States. I worked as staff physician in charge of acute medical unit in Essex Center in Cedar Grove, New Jersey. After my tour of duty there, I went to Binghamton Psychiatric Center. I was a primary care physician there in charge of acute and chronic geriatric medical cases.

After that, I underwent formal training in the field of psychiatry at Yale University School of Medicine residency training in psychiatry in three hospitals in Connecticut; namely, Fairfield Hills Hospital in Newtown, Connecticut, Connecticut Valley Hospital in Middletown, Connecticut, and Dana Psychiatric Clinic in New Haven, Connecticut.

Q. How long did you – how long was your specialized [433] psychiatric training at Yale law – Yale Medical School?

A. I was there for three years. And following my training in the field of psychiatry, I underwent three subspecialty training or fellowship training also in the

field of psychiatry. My first fellowship training was in crisis intervention psychiatry, commonly known as community psychiatry. I took that at New York Medical College in Valhalla, New York.

After finishing that, I went and got certified for having training for six months in electro-compulsive treatment dealing with depressed patients at that time. Following that, I underwent training in my second fellowship, also with the New York Medical College. I finished geriatric psychology.

After finishing that fellowship, I went into my third fellowship training in Albert Einstein College of Medicine, Yeshiva University in Bronx, New York. I did my biological psychiatry and psychopharmacology fellowship training. At that time I was involved in research, and during that year period of time I had one paper published.

[434] Q. Anything after that?

A. After finishing my fellowship training, I went to Ohio and served as a staff psychiatrist at Massillon Psychiatric Center for almost six years. While there, I was involved in doing assessment and treatment of patients in the administration unit, continuing treatment unit, intensive psychiatric care unit dealing with patients with dual diagnoses as well as patients sent to us for evaluation by the court within the counties of the hospital in Ohio. After about six years of there, I went to Larned State Security Hospital, and I've been there for the past three years.

Q. And what exactly is you duties at Larned State Security Hospital?

A. We are evaluating and treating patients who are referred there by the court.

Q. Are you a licensed psychiatrist in the state of Kansas?

A. I am. Yes, I am.

Q. How many other states are you a licensed psychiatrist in?

A. Previously in Connecticut, and then when I came to New York – in Ohio I was also licensed there, and currently with the state of Kansas.

[435] Q. All right. Doctor Mabugat, I take it from your extensive history that you are very interested in the field of psychiatry.

A. I am, that's correct.

Q. Do you keep current in the literature in the field of psychiatry?

A. Yes, I do.

Q. Okay. Do you belong to any professional associations in the area of psychiatry?

A. Currently I only belong to the Larned State Hospital, state security hospital medical staff association.

Q. Okay. Have you ever testified in court before as an expert in the area of making a diagnosis of a patient that you've seen?

A. Yes.

Q. Approximately how many times have you testified, Dr. Mabugat, regarding your diagnosis?

A. Offhand I cannot really tell you the number, but I have had more than enough. I've had a lot of court hearing cases.

Q. I would assume that over the course of your training and experience you have probably seen thousands of patients; is that correct?

A. That's correct.

[436] Q. Made thousands of diagnoses regarding those patients?

A. That's correct.

Q. Okay. Are you familiar, Dr. Mabugat, in the – in your field of expertise with sexual disorders?

A. Yes, I am.

Q. Are you familiar with nonsexual mental disorders?

A. Yes, I am.

Q. Okay. Are you familiar with the term sexual predator?

A. Yes, I am.

Q. Are you familiar with the Kansas statute regarding sexual predators?

A. Yes, I am.

Q. Okay. Have you as part of your job duties and descriptions conducted evaluations on individuals specifically for the purpose of determining whether or not in your professional opinion they are a sexual predator according to the Kansas statute?

A. I have, yes, I have.

Q. Do you know how many you've done?

A. Sexual predator evaluation?

Q. Yeah.

A. Up to the present time, I've done about ten.

[437] Q. Okay.

A. But since February I've done six.

Q. All right.

A. Up to February, I'm sorry. Up to February of 1998, I've done six, and up to the present time I've done ten.

Q. All right. When an individual is referred to your facility for an evaluation, that referral generally comes after the court has already had a probable cause hearing on the matter, correct?

A. That's correct.

Q. And it is your job to look at the patient, do your evaluation, and then make a recommendation one way or the other as to whether or not you think that person meets the criteria, correct?

A. That's correct.

Q. Have there been occasions when you have looked at an individual and decided that they do not meet the criteria?

A. Yes.

Q. Okay. And there have been occasions when you've decided that the individual does meet the criteria?

A. Yes.

Q. Do you know what the percentage is on the [438] evaluations you've done on those you've recommended that are versus those you've recommended are not?

A. Well, up to February of '98, I said I had six, and one of the six we found to be a sexual predator. Up to the current time of ten, I have not found any of the four additional patients that we've evaluated.

Q. To be a sexual predator?

A. No. None has been.

Q. Okay. So out of the ten that you've done, are you saying that only one person you've recommended, or in your professional opinion, is a sexual predator?

A. Yes.

Q. Okay. Are you familiar with Michael Crane?

A. Yes, I am.

Q. Is this Mr. Crane seated over here?

A. Yes, it is.

Q. Would Mr. Crane be that person that you're referring to?

A. Yes, he is.

Q. When Mr. Crane was referred to your facility, did you conduct a personal interview with him?

A. Yes, I did.

[439] Q. Did you also review the criminal history provided to you regarding Mr. Crane?

A. Yes, I did.

Q. Okay. Did you also review various documents provided to you from the Department of Corrections and various police reports and things of that sort?

A. Yes.

Q. Had you also looked at an evaluation that was performed by Robert Huerter on Mr. Crane back in 1994?

A. Yes, I have.

Q. Was there other information that you looked at that I have not already enumerated, Dr. Mabugat?

A. No.

Q. Are you familiar with what the DSM-IV is?

A. Yes, I am.

Q. Okay. What does DSM stand for?

A. Diagnostic and Statistical Manual for Mental Disorders.

Q. Can you tell me what that is?

A. It is a book that we psychiatrists use as reference in order to have a uniform diagnosis of cases.

Q. Okay. Would it be fair to say that that's – it's [440] generally accepted in your field to be the bible of your work?

A. Yes.

Q. Okay. It's a red book?

A. Yes.

Q. You have had one in front of you?

A. Yes, I have.

Q. Okay. Are you very familiar with the DSM-IV?

A. Yes, I am.

Q. Do you use it on a day-to-day basis to help you in making diagnosis of certain types of mental disorders?

A. Yes.

Q. Okay. Did you use the DSM-IV in helping you arrive at your diagnosis regarding Mr. Crane?

A. Yes, I have.

Q. Okay. Might I first – do you have a copy of the Kansas Sexual Predator Statute, Dr. Mabugat?

A. Yes, I have.

Q. Would you pull that out, please? Can I go over that with you real quick?

A. Sure.

Q. All right. There are certain elements that must be met for a person to be considered a sexual predator, correct?

[441] A. That's correct.

Q. Okay. And the first element is that the person must have been convicted of or charged with a sexually violent offense, correct?

A. That's correct.

Q. Okay. And in Mr. Crane's case, you became aware that he had pled guilty to the crime of aggravated sexual battery in 1997, correct?

A. Yes, that's correct.

Q. And by statute that's one of the listed enumerated sexually violent offenses, correct?

A. Yes.

Q. So after we get through that part, then I suppose we're going to get into your field. The statute says, been convicted or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility, correct?

A. Correct.

Q. Okay. Let's go ahead and run through the latter part of that definition. Let's talk about, first of all, mental abnormality or personality disorder. Based on your expert opinion and your [442] contacts with Mr. Crane, do you have an opinion as to whether or not Mr. Crane suffers from a mental abnormality or personality disorder?

A. Yes.

Q. Okay. And what is that opinion?

A. He suffers from personality disorder.

Q. Okay. What is the name of the personality disorder he suffers from?

A. Antisocial personality disorder.

Q. Would you define for us what an antisocial personality disorder is?

A. It is a pervasive pattern of disregard for and violation of the right of others, the rights of others, usually starting from late childhood during adolescent age and continuing up to adulthood.

Q. Okay. Is an antisocial – does the DSM-IV list certain criteria that you are to look for in helping you determine whether or not a person suffers from an antisocial personality disorder?

A. Yes.

Q. Okay. How many criteria does the DSM-IV list regarding that?

A. We have a definition here of a pervasive pattern of disregard for and violation of the rights of [443] others, and three out of the seven enumerated items on the list here for which I considered, failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are –

THE COURT: Doctor, can you slow down, make sure the jury can hear you?

THE WITNESS: Okay.

A. Out of the seven items that needs to be satisfied, only three, at least three, is required.

Q. (By Mr. Toth) Okay.

A. And of the three, I chose No. 1, No. 3, and No. 4.

Q. Okay.

A. Number 1 states failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest.

Q. Okay.

A. Number 3 is impulsivity or failure to plan ahead. Number 4, irritability and aggressiveness as indicated by repeated physical fights or – and/or assaults.

Q. Okay. Are there other criteria listed under the antisocial personality disorder that Mr. Crane might also fit under that you just chose not to [444] include in your finding of the three out of the seven?

A. What I am certain of are the three criteria that satisfies describing Mr. Crane. The other four, I don't think there are enough evidence or supporting factors for those four.

Q. But there may be evidence of them, but you don't find them significant enough?

A. That's right.

Q. All right. The antisocial personality disorder that Mr. Crane suffers from was one of the things you listed in your report as meeting the criteria under the sexual predator statute, correct?

A. That's correct.

Q. Does he also suffer from another mental abnormality that you identified?

A. Yes.

Q. What is that?

A. Exhibitionism.

Q. What is exhibitionism?

A. Exhibitionism is intense recurring, sexually arousing fantasy, sexual urges, or behaviors involving exposure of one's genitals to an unsuspecting stranger.

Q. So would it be fair to say from reading your [445] evaluation and talking with you before, the two major mental disorders Mr. Crane suffers from are exhibitionism and an antisocial personality disorder?

A. That's correct.

Q. All right. Now, continuing on in the legal definition, it says charged or convicted of a sexually violent offense, suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

I'd like to talk about this last portion of the definition. Does the mental abnormality and antisocial personality disorder that Mr. Crane has in your professional opinion make him likely to engage in predatory acts of sexual violence if not confined in a secure facility?

A. Yes.

Q. And the statute defines "predatory" as acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization?

A. That's correct.

Q. Okay. So in your professional opinion, this [446] mental abnormality and personality disorder Mr. Crane has makes him likely to re-offend if not kept in a secure place, correct?

A. Yes, that's correct.

Q. Can you tell us why you believe that?

A. Well, because there is a pattern of behavior that he has been exhibiting for a long period of time.

Q. Okay. And you're looking a lot at his criminal history, right?

A. Yes.

Q. Would it be fair to say that most psychiatrists generally agree that the best predictor of future behavior is past behavior?

A. That's correct, yes.

Q. And in Mr. Crane's case, has that always borne itself out?

A. Yes.

Q. Can you explain in your professional opinion, what is the predominant mental disorder that Mr. Crane is suffering from? Because he is clearly – he's had exhibitionism, he's just flashed, but he's also gone the next step

and actually physically attacked. What is – can you tell us in your opinion what is going on with Mr. Crane?

A. Well, I gave a diagnosis of exhibitionism because [447] it satisfies the – giving that diagnosis, but I would say that both diagnoses are in order here according to my opinion.

Exhibitionism although generally will not require perpetrator to do farther [sic] sexual activity with a victim, the antisocial personality disorder would. So I would say that where exhibitionism ends, antisocial personality disorder begins.

Q. I see. And is [sic] in Mr. Crane's case, because of his past history and what you know about him through all the testing and things of that sort, if he is not kept in a locked secure facility, at this point in time it's your opinion that he's likely to go out and re-offend, correct?

A. That's correct.

Q. Okay. Is it a situation in your professional opinion that Mr. Crane can't control his behavior, or won't control his behavior, or a combination thereof? Or what's your opinion regarding that?

A. I think it's a combination thereof. I said that in my deposition that he cannot control his behavior because he frequently places himself in such a situation that he cannot get away from doing what he did, and he just won't control or do [448] anything to control his behavior as well.

Q. Okay. He's not psychotic, correct?

A. He's not.

Q. Okay. He's not delusional as far as you can tell?

A. He's not.

Q. Okay. But his mental abnormality or personality disorder drives him to do the things that he does, correct?

A. That's correct.

Q. And he won't control it?

A. That's right.

Q. Okay. Were you able to determine whether or not Mr. Crane has any insight as to why he sexually offends?

A. No.

Q. Does that mean that he doesn't have any insight, or you weren't able to determine that?

A. I was not able to determine whether he has or not.

MR. TOTH: Okay. Thank you, Dr. Mabugat.

THE COURT: Mr. Donham, do you want to get started? You want to take a break now? What's your preference? I assume you have substantial cross.

MR. DONHAM: Judge, I can tell you I'm [449] probably going to be talking with Dr. Mabugat for at least an hour.

THE COURT: Why don't we go ahead and take a break of about 15 minutes. Remember the admonition not to discuss the case during the break.

(A break was taken.)

THE COURT: Doctor, you want to come take the stand? Mr. Donham.

MR. DONHAM: Thank you, Judge.

CROSS-EXAMINATION

BY MR. DONHAM:

Q. Doctor Mabugat, you and I have met about this event before, have we not?

A. Yes, we have.

Q. In fact, both you and I and Mr. Eaves and Mr. Scott Toth, we met down at Larned State Hospital on July 9th of this year to discuss this, did we not?

A. Yes.

Q. At that time you underwent what is called a deposition where you gave testimony under oath.

A. Yes.

Q. And your testimony under oath was transcribed by a court reporter into what's called a transcript of

* * *

[456] get to whether there's a difference in the testimony. But let me ask you to rephrase the question.

MR. DONHAM: Thank you, Judge.

Q. (By Mr. Donham) Doctor Mabugat, you didn't rely on the testimony of any of the victims in order to reach your findings, did you?

A. No.

Q. Now, in preparing your evaluation on Mr. Crane, did you have a formal personal interview with him?

A. Yes.

Q. Did you think that was necessary to have a formal personal interview?

A. Yes.

Q. One of the goals of – or I should say one of the purposes for your evaluation is to determine his mental status now, isn't it?

A. Yes.

Q. You relied, I take it, on medical reports that you may have had from back in 1993, didn't you?

A. I'm sorry? Excuse me?

Q. Did you rely on medical evidence that you had in your files, evidence that was put together back in 1993?

A. Yes.

[457] Q. But you still wanted to interview him personally in order to see what he was like today?

A. Yes.

Q. In your professional opinion, do you think that your evaluation of him could have been conducted without a personal interview?

A. No.

Q. Now, in your interview of Mr. Crane and your observations of his behavior, you found that he did not suffer from any kind of psychosis?

A. That's correct.

Q. And a psychosis I believe is a disturbance of a person's communication, thought process, and perception, isn't it?

A. That's correct.

Q. You found, I believe, in your diagnosis that he suffered from two and only two disorders, that being exhibitionism and antisocial personality disorder, correct?

A. That's correct.

Q. And you and I discussed how one went about making that decision of antipersonality – excuse me, antisocial personality disorder by following the guidelines of your DSM-IV handbook?

A. Yes.

[458] Q. And I believe you testified that in that criteria for determining if a person had an antisocial personality disorder, that of the seven things that one might look for, you found Mr. Crane satisfied three of them?

A. That's correct.

Q. In fact, that's the minimum number of things that a person can satisfy in order to quality for an antisocial personality disorder, correct?

A. That's correct.

Q. We went through those things, the first one being the failure to conform to social norms with respect

to lawful behaviors, as indicated by repeatedly performing acts that are grounds for arrest. Do you remember us going through that?

A. Yes.

Q. Do you recall we talked about things such as a person who frequently steals? You recall that?

A. No.

Q. Do you recall us discussing the difference between – or rather the notion that a person who repeatedly shoplifts might or might not suffer from kleptomania?

A. That's correct.

Q. We distinguished, did we not, between the [459] difference – or the difference between someone who repeatedly commits acts of unlawful behavior but does not suffer from a disorder that attacks their volitional control, didn't we?

A. Yes, we did.

Q. In fact, you stated under oath at that time that the fact that a person has an antisocial personality disorder does not necessarily mean that their volitional control is so impaired that they cannot control their behavior. Correct?

A. Correct.

Q. More importantly, when we discussed Mr. Crane specifically, when asked if you felt that his commission of

sex offenses was – whether he couldn't control his behavior or whether he just didn't care about people, you chose the latter, didn't you?

A. Yes.

Q. And it's still your opinion today that Michael Crane committed those sex offenses out of clear choice.

A. I said that before, yes.

Q. Well, I understand you said it before, Doctor, but –

A. Yes.

[460] Q. – these people weren't here.

A. Yes.

Q. The jury wasn't here when you and I talked about this, so please forgive me if we go over what seems like plowed ground again.

So we're perfectly clear, Dr. Mabugat, the information that you had at your disposal at the time of your evaluation of Michael Crane the spring of this year included what kind of documents?

A. As I said during my deposition, we reviewed his past medical records that we have in our hospital, we reviewed the police record that was sent to us that we reviewed, and the affidavit as mentioned earlier, and the evaluations made previously by the other evaluators.

Q. You had, I believe, reports prepared by psychologists and psychiatrists from the Larned staff in 1993, correct?

A. That's correct.

Q. You had the reports prepared by psychiatrists and psychologists at a state-sponsored facility called the Kansas Reception and Diagnostic Center in Topeka?

A. Yes.

* * *

[463] then?

A. I don't know.

Q. On the day you did your evaluation, had he had any treatment?

A. No.

Q. You testified earlier about your opinion as to Mr. Crane's likelihood to re-offend.

A. Yes.

Q. Is that likelihood to re-offend based upon his past?

A. The pattern of behavior that he has.

Q. Okay. What do you have or what can you point to in the DSM-IV manual that would substantiate your claim that he is likely to re-offend in the future?

A. The pervasive and repetitive act, unlawful acts.

Q. Well, I know you're just restating what you just said, he's done it before. What, do you think a person can't change?

A. Oh, yes.

Q. In interviewing Mr. Crane, did you determine if he had ever served any time in prison for any sexual offenses?

A. Yes.

Q. When?

[464]A. From 1993 to January of 1998.

Q. Okay. That being the case that brought him – the most recent case, when he got out of prison he was sent to your place?

A. That's right.

Q. Any other incarceration prior to that?

A. Not recent – not after – no.

Q. Are you familiar with the goal of the Department of Corrections here in the state of Kansas as being to maximize rehabilitation of a person while they're in prison?

A. Yes.

Q. Do you think that the Department of Corrections – let me strike that.

Do you think having Mr. Crane sit in prison for five years was some form of rehabilitation?

MR. TOTH: I'm going to object to that question, Your Honor. It's beyond the scope, and relevance.

MR. DONHAM: Judge, if I may, I –

THE COURT: Overruled.

MR. DONHAM: Thank you, Judge. And just for the record, we issued a subpoena for Dr. Mabugat as well and for just this purpose, so [465] that I could go beyond the scope. I can recall him, but I know he wants to get back to Larned, so –

THE COURT: Well, let's see where we go here, but that objection's overruled.

MR. DONHAM: Thank you, Judge.

Q. (By Mr. Donham) Do you see any purpose rehabilitation-wise as a psychiatrist in just letting someone sit in prison for five years?

A. No.

Q. You do treatment at Larned; is that correct?

A. Not with sexual offenders, but we do give treatment there.

Q. You do treatment of people with an antisocial personality disorder, though, right?

A. Yes.

Q. And you do treatment on people who have a mental disorder of exhibitionism?

A. Yes.

Q. But are you testifying that if Michael Crane were committed, that you wouldn't do treatment for him?

A. We would if we are equipped with treatment that he really needs, such as Sex Offender Treatment Program. We don't have that at Larned State Security Hospital.

[466] Q. Mm-hmm. So where do the people like Mr. Crane go if they don't go to the Larned State Hospital?

MR. TOTH: I'm going to ask to rephrase the question because that assumes either he is not found to be a predator or he is, Your Honor. It may be confusing.

MR. DONHAM: I can rephrase the question, Judge.

THE COURT: Very well.

Q. (By Mr. Donham) Doctor Mabugat, the people who are currently in the system who have been found to be sexual predators, are they under the care of people like yourself at the Larned State Hospital?

A. No.

Q. Where are they?

A. They are in the Department of Corrections.

Q. So they're more or less back in prison?

A. Yes.

Q. The building they're at, as I understand it, it's a building surrounded by high walls with coiled razor wire.

A. High wires, not walls.

Q. A fence?

A. Fence. That's correct.

Q. A fence, and it has the coiled razor wire?

[467] A. Yes.

Q. And I think it even has gun towers on the corners, does it not?

A. That's correct.

Q. Now, you treat people with antisocial personality disorder and exhibitionism. Where are your patients located?

MR. TOTH: I'm going to object and ask to approach, Your Honor.

THE COURT: All right. Come on up.

(The following proceedings were had at the bench by Court and counsel out of the hearing of the jury:)

MR. TOTH: I do apologize for keep [sic] interrupting because I hate to do that, Judge, but we are now completely getting away from the issue, and now we're talking about the treatment as opposed to whether or not Mr. Crane is a sexual predator.

And I'm not objecting on a scope basis, but I can't see this as being relevant because the statute doesn't provide for alternative methods of treatment. They have to find that he's a predator or not, and what happens after that is subject to the statute.

[468] MR. DONHAM: What they have to find is whether or not he needs to be committed for treatment. I think they need to understand what are we talking about treatment. Treatment's an issue. That's why we're here.

MR. TOTH: I mean, treatment may be an issue, but where he gets treatment is not an issue, and under what methods he gets treatment is not an issue.

THE COURT: Well, where were we? We were at gun towers, right?

MR. DONHAM: Actually, we were if they put the people with these two disorders that are called sexual predators in gun towers, where do they put the people with the same disorders that aren't considered sexual predators. Just asking where his patients are located.

MR. TOTH: He – he has no personal knowledge of the sex offender treatment program for the sexual predators, Judge, and that's what I'm objecting to. Doctor Mabugat's practice is limited to the evaluation phase of it over at the state security hospital. Where the predators are housed is over at the state prison hospital, which is on the other side of the road. It's run by [469] Department of Corrections and not by S.R.S. It's a completely different ball of wax.

MR. DONHAM: I'm asking him about his patients. I'm not asking him about someplace that doesn't do treatment. I want to ask this expert about – we're going to talk about what kind of treatment can you do. That's all. What kind of treatment – where are his patients, and how does he treat them.

THE COURT: Well, I think you can inquire of him what kind of treatment is appropriate, but I'm not sure I do understand any relevance to people being treated outside of this –

MR. DONHAM: It's – I'm sorry.

THE COURT: – outside the scope of the sexual predator facility.

MR. DONHAM: Well, we raised an issue that the sexual predator proceeding is punitive in nature, and this witness can lend support to our allegations about the fact that people with identical medical disorders are segregated.

Those that have been found to be sexual predators are kept in a prison setting while those who just have the same disabilities are kept in a [470] more comfortable surrounding.

MR. TOTH: Judge, that's an issue for a habeas proceeding or something. It has nothing to do with the merits of the case.

THE COURT: Yeah. Again, I'll give you some leeway about what kind of treatment he would receive or should receive, but I don't see any relevance to some differentiation between him and somebody else with similar disorders.

In other words, you know, I'll give you some leeway on whether or not, if he's found a sexual predator, he'll get treatment and what kind of treatment he'd get. I think that's a fair area of inquiry. But what this doctor does with people who haven't been found to be sexual predators is not relevant.

MR. DONHAM: Well, I think it is if he can testify that he knows for a fact the treatment being given sexual predators is a far cry from the ones given to people that aren't. For instance – and I'd like to make a proffer at this time.

I think he would testify as he did in the deposition that the people who are not incarcerated in the prison

setting have much freer lifestyle. They are treated as involuntarily [471] civilly committed people, and that they can be treated chemically, which is his specialty. They can be treated chemically, and once they have stabilized, they are free to roam around in the general population.

Sexual predators, on the other hand, apparently, according to Dr. Mabugat, don't get the chemical treatment. They are just sitting out there and certainly sharing their feelings, petting the dog, and waiting for their lives to expire. It's – I think it's an issue that goes to is there treatment being provided or not.

And I think we're entitled to get into it, because again, you're asking this jury to commit him for treatment when there may well be other avenues available for treatment.

THE COURT: Are you saying this goes to the possibility that there's treatment which would make him less likely to re-offend even though not confined in a secure facility?

MR. DONHAM: That's a very real possibility.

MR. TOTH: How can he do that, Judge, if Mr. Crane's not going to be a court commitment from somebody that's been ordered by the court to [472] go to Larned State Hospital? The only people that can treat at Larned State Hospital at that facility are people in Department of Corrections custody that are flipping out, freaking out while they're in prison, and they're shoved over to Larned.

Mr. Crane is not eligible for treatment at that facility by the mere fact that he has finished his sentence with the Department of Corrections. That's the problem.

THE COURT: Well, I think you both know more about what – the doctor's answers than I do because I haven't read his deposition. I think respondent can get into evidence generally, what kind of treatment he would receive if confined, if determined to be a sexual predator. And if there is evidence that there are available treatments which would render him unlikely to re-offend even if not confined, that would be relevant evidence.

I don't think it's relevant, however, what sort of treatment folks are receiving who aren't in one of those two categories. So you know, maybe you can – I don't know if you could rephrase and kind of go that direction. In other words, treatment that other people are receiving [473] at Larned, I agree, is not relevant. But I think you can inquire about alternatives to confinement as a sexual predator.

MR. DONHAM: Well, that gets away from the entire thrust of our – of this particular portion, so I'd just like to have our objection noted. We'll move on to a different topic.

THE COURT: Very well.

(Thereupon, the following proceedings continued in the hearing of the jury:)

Q. (By Mr. Donham) Doctor Mabugat, you expressed an opinion earlier about the likelihood of Mr. Crane re-offending, and you said that you felt that he was likely to re-offend.

A. Yes.

Q. How comfortable are you with the statement that you feel he's likely to re-offend?

A. I am comfortable with that statement.

Q. Would you be willing to put a percentage on that?

A. No.

Q. Okay. Would you be willing to say that you feel beyond a reasonable doubt he'll re-offend?

A. Yes.

Q. Do you think he'll re-offend beyond a reasonable doubt?

[474] A. Likely. More likely.

Q. Do you think – I guess I don't understand. You're saying that you can't say that he'll re-offend beyond a reasonable doubt, but you can say that it's likely that he'll re-offend? Is that right?

A. Yes.

Q. At your deposition, page 44, you seemed a little hesitant to give a percentage. I think the answer you gave me then was that if you were forced to giving a percentage you would say 51 to 49. Is that correct?

A. Yes. More than 50 percent.

Q. The antisocial personality disorder, person tends to grow out of that as they get older, don't they?

A. The – yes. The signs and symptoms gradually diminish. This is what the book says.

Q. Isn't it true that as a person enters their 40s, that statistically you can expect to see antisocial personality disorder decline?

A. Gradually, yes.

Q. Okay. And I'm sorry, not 40s, as he enters into his 30s, excuse me. That would be his fourth decade, right?

A. Yes.

[475] Q. Zero to ten years of age would be his first decade?

A. Yes.

Q. Ten to 20, 20 to 30, once he gets in his 30s he begins to lose that antisocial personality trait; is that correct?

A. Not lose, but it will gradually diminish at that decade.

Q. All right. Mr. Crane's, what, 37 years old now?

A. 36? 37, yes.

Q. 36? And in 1993 when the evaluation was done, he would have been, what, 30, 31 years of age?

A. Yes.

Q. And that's the information that you used to form your opinion; is that correct?

A. Yes.

Q. But he's much older now, isn't he?

A. Yes, he is.

Q. Did you run any additional tests on him this time?

A. No.

Q. Would you be willing to say, then, that maybe your 51 to 49 percent likely is starting to maybe slide back towards 49 to 51?

MR. TOTH: I'm going to object at this point. I think that's a mischaracterization of [476] the doctor's testimony regarding the percent.

THE COURT: Overruled.

Q. (By Mr. Donham) You can answer.

A. I would still say that in all likelihood the rate of re-offense would be more than 50 percent, and I said 51 to 49 will tip the balance.

Q. Sure. And that's based on him in 1993, though. Am I right?

A. Until the present time, I would say so.

Q. Okay. Well, you based primarily your conclusion that he is antisocial based upon his criminal history that goes back to, what, 1988?

A. Yes.

Q. Well, all I'm asking you is, is it possible that now that five or six years have gone by since you established your 51 to 49 balance, Michael Crane here has grown out of that enough to where you could no longer make that statement?

A. There's a possibility. You're asking for possibility.

* * *

[490] 15.

MR. DONHAM: Okay. I'm sorry, Judge, I'm probably wandering. No doubt it's a compound question.

Q. (By Mr. Donham) If you would also agree that in order to say here today as an expert witness that conduct disorder requires a showing of this repetitive and persistent pattern of behavior, if you can't tell us what he did, you can't say that, can you?

A. I just said I can't remember, but I read about that.

Q. Okay. I'd just like to close with – I'd like to reask you one more time: Mr. Crane's disorders do not affect his volitional control to the degree that he cannot control his behavior, do they?

A. Yes.

Q. When you say that, you're agreeing with my statement?

A. Yes.

MR. DONHAM: Thank you. Judge, I don't have any further questions at this time.

THE COURT: Redirect?

MR. TOTH: Thank you, Your Honor.

REDIRECT EXAMINATION

[491] BY MR. TOTH:

Q. Doctor Mabugat, you're familiar with the statute, we've already established that, correct?

A. That's correct.

Q. All right. And isn't it true that under the interpretation of the statute, in a literal reading of the statute, a person does not have to lose their volitional control in order for a person to be a potential sexual predator?

A. That [sic] correct.

Q. Okay. The statute's very clear that there are two types of psychological disorders that it addresses; a mental abnormality which the statute defines as a congenital condition affecting a person's volitional capacity which predisposes them to commit acts of sexual violence. You're familiar with that, correct?

A. Yes.

Q. What would be an example of a mental abnormality that would fall under that definition?

A. Antisocial personality disorder.

Q. Okay. So in your opinion, antisocial personality disorder qualifies also as a mental abnormality?

A. Yes.

[492] Q. Okay. And then the statute clarifies. It says, convicted of a crime and suffers from a mental abnormality or –

A. Or –

Q. – personality disorder, correct?

A. Yes.

Q. And antisocial personality disorder clearly is a personality disorder?

A. That's correct.

Q. And there is no requirement in the statute that a personality disorder be of the type where it affects a person's volitional or emotional capacity?

A. That's correct.

Q. So do you see a distinction there between the statute that says mental abnormality or personality disorder, or do you run the two together?

A. There's a distinction.

Q. Okay. Would exhibitionism be a mental abnormality potentially, or would it be a personality disorder?

A. It is a sexual disorder per se.

Q. Okay. You are not of the opinion, then, Doctor, that a person needs to be psychotic or delusional [493] or insane when they commit a crime in order for a person to qualify as a predator if the other criteria are met?

A. Yes.

Q. Okay. A person can understand what they're doing and be in a position of controlling it and still be a sexual predator if they suffer from an antisocial personality disorder?

A. Yes.

Q. Okay. Let me clean up just a few things, and then we'll get you out of here. I don't want to mischaracterize your position regarding the likelihood of Mr. Crane re-offending, because you testified at a deposition, you testified here today, and as I understand it your testimony is that in your professional opinion there is a likelihood that Mr. Crane will re-offend beyond a reasonable doubt unless confined in a secure facility, correct?

A. Correct.

Q. Okay. You're not saying he's going to re-offend beyond a reasonable doubt?

A. That's right.

Q. You're saying there's a likelihood he'll re-offend –

[494] A. Yes.

Q. – beyond a reasonable doubt. And isn't it true that's what this statute requires you to find?

A. Yes.

Q. Okay. I mean, you can only go off of certain things like what he's done in the past and what he said and things of that sort, correct?

A. Correct.

Q. All right. I mean, you can't predict with a, you know, a hundred percent certainty on issues like this, right?

A. No. Definitely not.

Q. Okay. But you have been doing this for many, many years?

A. Yes. I have.

Q. And let me address this issue about conversations you may have had with Ken Eaves. Is it my understanding, Doctor, that at the time – well, originally Ken Eaves was working with Mr. Crane, correct?

A. Yes.

Q. And then he consulted with you, and then you also did an interview with Mr. Crane?

A. Yes.

Q. Okay. And at the time you and Mr. Eaves or at [495] least Mr. Eaves made his initial determination as to whether or not Mr. Crane may be a predator or not, you did not have all of Mr. Crane's criminal history, correct?

A. That's correct. This is what I was saying earlier.

Q. Right. And how important is criminal history to you in making this determination?

A. The pattern of behavior that he has been exhibiting for a long period of time.

Q. Okay. You knew, did you not, that Mr. Crane did have a history of exhibitionism?

A. Yes.

Q. But you were not aware of the fact that Mr. Crane also has a substantial history of physically attacking women, or at least you didn't at that time, correct?

A. That's correct.

Q. All right. And when you found that out, that was the thing that clearly made you make this determination?

A. Yes.

Q. And you've only made this determination in one out of ten cases that you've ever done?

A. That's correct.

[496] Q. Okay. And you think it was the presentence investigation that I sent you later that may have tipped you off that there was more information you needed?

A. Yes.

Q. Okay. Do you specifically remember seeing information about physical attacks before I sent you the presentence investigation?

A. No.

Q. Okay. If you did see it, you certainly don't remember it, right?

Q. Oh. Oh, and the same deal with this conduct disorder requirement. For a person to have antisocial personality disorder, you've got seven criteria. The person has to be at least 18 and have some symptoms of conduct disorder, which means basically that they did some bad things before they were the age of 15, right?

A. Yes.

Q. And you don't specifically recall what instances Mr. Crane had of conduct disorder, but you do recall that there were some instances that made you feel comfortable that there was that history there?

[497] A. Yes. He has that history, and I've read that history.

Q. All right. You just don't know for sure –

A. That's right.

Q. – what it is that you read?

A. That's right.

Q. Okay. Oh, would it also be fair to say, Dr. Mabugat, this – the incident in 1993 where he attacked the woman in the video store in Leawood, you're somewhat familiar with that, right?

A. Yes.

Q. All right. He did that offense when he was well into his forth decade of living, right?

A. Yes.

Q. Okay. And there's nothing magical to say that when a person turns 30, all of a sudden the symptoms of antisocial personality disorder are going to appear, right?

A. Yes.

Q. Disappear?

A. Disappear.

Q. As a matter of fact, the longer history a person has, the less likelihood that you can safely say that they are no longer going to be suffering from antisocial personality disorder?

[498] A. Exactly. It would take a long time.

MR. TOTH: Thank you, Doctor.

THE COURT: Recross?

MR. DONHAM: Thank you, Judge.

RECROSS-EXAMINATION

BY MR. DONHAM:

Q. Doctor Mabugat, since we're on the subject of what needs to be shown, I think at your deposition you agreed with me that the United States Supreme Court in its opinion involving a gentleman by the name of Hendricks said that they would sustain a sexual predator program here in the state of Kansas to that very small subset of dangerous people whose volitional control is so impaired by this particular mental abnormality or personality disorder that they are unable to control their behavior. And you agreed with that on July 9; is that right?

A. Yes.

Q. So the United States Supreme Court has passed judgment on the Kansas Sexual Predator Act, hasn't it?

A. Yes.

Q. And it's limited its application, hasn't it?

A. Yes.

[499] Q. You were aware that initially this Sexual Predator Act was found unconstitutional by the Kansas Supreme Court?

A. Yes.

MR. TOTH: Objection, relevance.

THE COURT: Sustained.

Q. (By Mr. Donham) Let's go back to criminal history very briefly. I have a couple of questions for you, and then I think I'll be done, Judge.

If I understand the report that you prepared on March 3rd, you said that if the sexual offenses in his criminal history were true, then he's a sexual predator.

A. That's correct.

Q. You said if we only consider the sex offense involving a woman by the name of Ms. Shy, who's testified there yesterday, the video store incident, if we only considered that and his current mental status, he's not a sexual predator.

A. That's correct.

Q. And you're saying that you didn't have his complete criminal history when you made your initial evaluation of him?

A. That's correct.

[500] Q. In the list of sex offenses, it is not true that if we go back in time from his January 1993 video store offense, you have to go all the way back to 1988 where he was charged with grabbing a woman riding on a bicycle path; those charges later dismissed when she identified someone else? Is that correct?

A. Yes.

Q. You're saying that in performing a sexual predator evaluation to potentially lock someone up for the rest

of their life, you spent the month of February, and your records didn't go back as far or any farther than – or didn't come forward, I should say, through 1988?

A. We have a record way before that that came when Mr. Toth –

Q. Okay.

A. – sent us this information.

Q. Well, what I keep coming back to here, if his sex offenses ranged from about 1985 to 1988, you had those initially, didn't you?

A. Yes.

Q. Well, there weren't any other sex offenses, were there?

A. I'm sorry? Excuse me?

[501] Q. Look at the list that you compiled where you say if we consider these he's a sexual predator. It's your report. You've got two sex offenses that occurred in 1986, you've got a 1985 indecent exposure, right?

A. Yes.

Q. You've got October of '88, the incident where someone said he pulled her off a bicycle. Correct?

A. Yes. That's correct.

Q. And then you have the offense that he was sent down to Larned for in 1993, and you had all those reports, right?

A. Yes.

Q. When he went down there in 1993 for an evaluation, did they not have his complete criminal history up to including his offense in 1993?

A. Yes. But the records that we have available to us at that time, as I was saying earlier, was not complete. It might have been there, but it was not available for us at that time. It was only after we have all this [sic] records available to us that we were able to make the decision, made the decision that he is.

Q. So you had all the records from the Department of [502] Corrections?

A. Yes.

Q. You had the records from his January 1993, which were your own records right there at Larned?

A. Yes.

Q. You've got the commitment review release, right?

A. Yes.

Q. I mean, in order to initiate the sexual predator, someone from Lansing Correctional Facility set down and compiled a complete list of his criminal history in order to provide that to a term of prosecutors known as the Commitment Review Committee, am I right?

A. That's right.

Q. And that Commitment Review Committee made a recommendation to Carla Stovall, the Attorney General, that there may be evidence here this person's a sexual predator, right?

A. Right.

Q. And you're saying, then, that all of that compiled by the Department of Corrections in 1997, which included a 1993 conviction, 1988 assumption, two convictions in '85 – or in '86 and '86, you're saying all these people that put all this together overlooked what?

[503] MR. TOTH: I –

Q. (By Mr. Donham) What criminal offense did they all overlook?

MR. TOTH: I'm going to object. Where are we going with this? What's the relevance, Your Honor? Doctor Mabugat has made his diagnosis. If he didn't have information initially and now does, I think he's explained it. It seems to me that we're badgering him at this point.

THE COURT: Overruled. Can you answer that question?

Q. (By Mr. Donham) What offense did you not have? What came as a surprise on the 28th day of February?

A. The records that was mailed to us by Mr. Toth. I was saying earlier that all this [sic] records might have been available, but we were not able to read those documents –

Q. So you made a –

A. – during – while we – when we made the preliminary draft. But after we received this – I'm not saying that this informations [sic] were not available in our record in the hospital. Could have been there. But we were not able to read [504] those documents or medical

records. It was not only – it was only after Mr. Toth sent us this record that it became obvious that there was a pattern of behavior that he has been exhibiting for a long period of time.

Q. Did that record from Mr. Toth include this 1988 episode –

A. Yes.

Q. – where a woman said –

A. Yes.

Q. That was a new offense that you hadn't seen? Correct?

A. A new offense?

Q. Well, it was an offense that you hadn't seen before, am I right?

A. Yes.

Q. Did it include one where a couple of women were out getting in a car by a snow bank in a parking lot and a guy in a brown car with long brown hair pulled up and was masturbating, and so they sat there and smoked a couple of cigarettes while they decided what to do? Was that one of the new offenses provided to you?

A. I think so, yeah. I can't specifically remember every offense.

[505] Q. In your report, you specifically said that if those offenses are true, he's a sexual predator.

A. Yes.

Q. Let me ask you something, Doctor. What if the allegation by this woman in 1988 where she picked somebody else, what if that were not true? Would that change your opinion?

A. What I mean – let me clarify my view regarding this. When we stated here that if the criminal offenses listed during – in the criminal history section are true then he is, because in that way we will – we were able to determine the pattern of behavior that he has been exhibiting.

Now, if we only consider the case, the current case in 1993, we were not able to establish the pattern of behavior. So that this is what we mean by if it is true then he is, because there's a pattern of behavior there. If we only consider the offenses that – the current case from 1993, then we cannot establish the pattern of behavior. Without the list of offenses that he had previously, we were not able to establish the pattern of behavior.

Q. Well, let me ask this a different question, then. In the criminal history that you relied on where [506] you said – or you made your opinion contingent on that history being true, how many of those, if they were shown not to be true, would it take for you to change your opinion?

A. I don't know.

Q. You don't have any feel at all?

A. I don't –

Q. Let me ask you this: What if the only criminal offenses you had that were considered valid was an offense in October of '86 and December of '86, and then

there was a long spell of nothing, and then in January of '93 there was another offense? Is that a pattern?

A. I would say so.

MR. DONHAM: No further questions.

THE COURT: Anything further?

MR. TOTH: No. Thank you.

THE COURT: All right. Thank you, Doctor.

THE WITNESS: You're welcome.

MS. CAMERON: Just can we break for five minutes?

THE COURT: Yeah. You want to come up?

CIVIL ACTION

IN THE DISTRICT COURT FOR THE
TENTH JUDICIAL DISTRICT OF KANSAS
JOHNSON COUNTY, KANSAS

Case No. 97C16409
Appellate Ct. No. 98-82080-A

[Caption Omitted In Printing]

[507] (An off-the-record discussion was had by Court and counsel at the bench out of the hearing of the jury and the reporter.)

THE COURT: Ladies and gentlemen, we'll take a short break here, five minutes or so, and then we'll move on to the State's next witness. Remember the admonition not to discuss the case.

(A break was taken.)

THE COURT: Mr. Toth, you can call your next witness.

MR. TOTH: Thank you, Judge.

KENNETH EAVES,

called as a witness on behalf of the Petitioner, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TOTH:

Q. Would you state your name, please.

A. Kenneth Eaves.

Q. Mr. Eaves, what's your occupation?

A. Psychologist with Larned State Hospital.

Q. Okay. Do you have a title that goes along with that, being a psychologist?

A. LMLP.

Q. What does that stand for?

A. Licensed master's level psychologist.

[508] Q. How long have you been a licensed master's level psychologist?

A. About a year.

Q. Okay.

A. Or so. It just changed from registered master's level psychologist to licensed.

Q. The Kansas Board of Behavioral Science changed the designation of master's level psychologist about a year ago?

A. About.

Q. Okay. How long were you a registered master's level psychologist prior to that?

A. Since registry started. Several years.

Q. You have any idea how long?

A. Three years or so.

Q. Okay. How long have you been a psychologist?

A. I've been a psychologist since I started at Larned in 1983, October.

Q. Okay. So you've been a psychologist since 1983, then?

A. Yes.

Q. Okay. So that's about 15 years?

A. Yes.

Q. You know Bob Huerter, don't you?

A. I do.

[509] Q. Okay. He testified earlier this afternoon, and he's a licensed master's level psychologist as well, correct?

A. Mm-hmm.

Q. Do you have the same rights and privileges for diagnosis and treatment as Bob Huerter does?

A. Yes.

Q. And essentially do you perform the same kind of job functions as Bob Huerter? You do evaluations on people?

A. Yes.

Q. And over the course of your employment, have you done sexual predator evaluations on people?

A. Yes.

Q. And are you familiar with what the DSM-IV is?

A. Yes, I am.

Q. Okay. That's the big red book, right?

A. Right.

Q. And you use that to help you make a diagnosis, correct?

A. Right.

Q. Are you aware of the 1993 – well, are you aware of the Kansas Sexual Predator Act?

A. I am.

Q. And have you had an opportunity to review that?

[510] A. I – yes.

Q. Are you familiar with the requirements of that statute?

A. I am.

Q. Okay. Did you perform an evaluation on Michael Crane?

A. I did.

Q. Is this Mr. Crane right behind me?

A. Yes.

Q. Okay. And are you familiar with Dr. Leonardo Mabugat?

A. I am.

Q. Okay. Did you work with Dr. Mabugat on the Crane evaluation?

A. I'm sorry?

Q. Did you and Dr. Mabugat work together on the Crane evaluation?

A. Oh, yes, I'm sorry.

Q. Did you both reach the same conclusions and opinions?

A. Yes, we did.

Q. And that opinion is that Mr. Crane suffers from exhibitionism and antisocial personality disorder, correct?

A. Yes.

[511] Q. Okay. Now, was that your original diagnosis, Mr. Eaves? Well, no, let me strike that. When you first met Mr. Crane, because you met him personally, correct?

A. Yes, at a staffing. It was in a group interview situation.

Q. Okay. When you first came into contact with Mr. Crane, did you have all available criminal history to you concerning Mr. Crane?

A. I hadn't seen it yet.

Q. Okay. What was your understanding of Mr. Crane's criminal history before you actually saw it?

A. Before I saw it?

Q. Yeah.

A. I had no understanding of it.

Q. Okay. Did you know anything about his criminal history? I mean, did you know, you know, here's a guy

who's coming in who's just a flasher, or here's a guy who, you know, likes kids, or – I mean, did you know anything about him at all?

A. No, I didn't.

Q. Okay. At some point in time did you, in meeting with Mr. Crane, tell him that it would in all likelihood be your opinion that he would not be a sexual predator?

[512] A. At one point, yes.

Q. Okay.

A. Early on.

Q. Why is it that you told him that? Because apparently that's caused some consternation.

A. It was really too early. I shouldn't have said anything.

Q. Okay.

A. But we had just did our initial interview, and he was explaining that he was – he had a problem with – with flashing, exhibitionism.

Q. Okay.

A. And after the interview, we were thinking that there may not be all that much to this sexual predator evaluation.

Q. Okay. So you were basing your opinion at that point, a preliminary opinion, on the criminal history Mr. Crane gave you, correct?

A. Yes.

Q. Okay. You did not know at that point in time that Mr. Crane had been convicted of sexually assaulting and physically attacking a woman, correct?

A. I don't recall that, no.

Q. Okay. And you were not aware that he had been [513] convicted of attacking more than one woman?

A. No, I did not.

Q. Okay. So Crane's telling you what his criminal history is, and you're going off of that, and you're saying, Well, if that's all it is, it's probably not going to be a sexual predator, correct?

A. Yeah.

Q. Have there been times you have declined to make a recommendation somebody's a sexual predator?

A. Have there – I'm sorry. Are you asking have there been predator evaluations that we did not find –

Q. Yes.

A. – to be predators?

Q. Yes.

A. Yes.

Q. Okay. So if you would have actually written a report that said in our opinion this person is not a sexual predator, that would not have been unusual for you?

A. No, it wouldn't have.

Q. Would it be fair to say, then, that Mr. Crane was not completely being truthful with you during your interview process about his criminal history?

[514] A. At least not totally forthcoming.

Q. Okay. Certain important omissions there?

A. Yes.

Q. Okay. And is it your opinion, Mr. Eaves, that the diagnosis that you and Dr. Mabugat made of exhibitionism and antisocial personality leads you to the opinion that Mr. Crane is likely to commit future acts of sexual violence if not kept in a secure facility?

A. Likely.

Q. Right. And you and Dr. Mabugat essentially agree on your findings, correct?

A. Yes.

MR. TOTH: Okay. Thank you, sir. Nothing further.

THE COURT: Mr. Donham, cross?

MR. DONHAM: Thank you, Judge.

CROSS-EXAMINATION

BY MR. DONHAM:

Q. Mr. Eaves, you've been subjected to a deposition in this matter; is that correct?

A. Yes, I have.

Q. You understand at the time of that deposition on July 9th you were testifying under oath?

A. Yes.

[515] Q. And I asked you a number of questions concerning your opinions about Mr. Crane; is that right?

A. I – yes.

Q. Okay. Do you have a copy of your deposition in front of you?

A. No, I don't.

MR. DONHAM: May I approach the witness, Judge?

THE COURT: Sure.

MR. DONHAM: I don't know if I should mark this or not. Why don't we mark it just for record purposes. You want to make it our Exhibit A?

Q. (By Mr. Donham) Mr. Eaves, I've handed to you what's been marked as Defendant's Exhibit No. A, and that is a copy of your – it is a transcript of your testimony under oath on July 9th. The District Attorney's Office would have sent to you a copy of that transcript. Have you – did you receive it?

A. Yes, I did.

Q. And did you review it?

A. Yes.

Q. Was it correct?

A. Seemed to be.

[516] Q. Did you have to make any changes to it?

A. I did not make any changes.

Q. Okay. On page 80 of your deposition, talking about Mr. Crane, you said that in your opinion, his exhibitionism was not heinous?

MR. TOTH: I'm going to object. That's an improper question, Your Honor. I think he needs to ask him his opinion, and then if there's a disagreement, we go into the deposition. If not, we're going to be here all day.

MR. DONHAM: This is cross. I can ask leading questions and actually make statements and ask for a yes or no.

THE COURT: Well –

MR. DONHAM: I'll rephrase the question, Judge.

THE COURT: All right. Thank you.

MR. DONHAM: I'm not sure what mistake I made.

THE COURT: Well, the way I would like to have this done is ask him the direct question, and if he gives an answer you don't think is consistent with his deposition testimony, then you can refer to the deposition.

MR. DONHAM: Okay.

[517] Q. (By Mr. Donham) In your opinion, is exhibitionism heinous?

A. No.

Q. Do you feel that a person diagnosed with exhibitionism is dangerous to others?

A. Ordinarily not.

Q. Okay. I think your testimony back then on page 80 going over to 81 was that if the person acted on an urge to expose himself, it would be just to expose himself; is that correct?

A. Yes.

Q. And I asked you at that time if you were familiar with a list of the sexually violent offenses that one has to be likely to commit in order to be considered a sexual predator. Do you recall that?

A. Do you – are you referring to items 1 through 12, Section E of the Predator Act?

Q. Most definitely.

A. Okay.

Q. Those where the Sexual Predator Act defines, quote, sexually violent offenses, end of quote?

A. Yes.

Q. You're familiar with that now?

A. Uh-huh.

Q. Where the diagnosis of exhibitionism is somebody [518] likely, due to that mental disorder, likely to commit one of those sexually violent offenses?

MR. TOTH: I'm going to object, Your Honor, and ask to approach. And I apologize for that.

THE COURT: All right. Come on up.

(The following proceedings were had at the bench by Court and counsel out of the hearing of the jury:)

MR. TOTH: Your Honor, that's an improper question. The statute does not require that a person have to commit a sexually violent offense if they're a predator. The statute requires that they're likely to commit predatory acts of sexual violence, which is set out in subsection (c).

This section has to do with the prerequisite conviction, not with what they're going to go out and do. And he's misleading the witness and misinterpreting the statute by asking a question like that.

MR. DONHAM: Maybe I don't understand. Are you saying that the Sexual Predator Act could lock someone up in order to prevent him from exposing himself in the future?

[519] MR. TOTH: If the jury determines that that is a predatory act and they've been convicted of one of these 12, then it's up to the jury to decide. But they don't have – we don't have to prove that he's going to prove 1 through 12.

MR. DONHAM: I can't read it –

THE COURT: Well, I agree with that, although there would hopefully be a great deal of overlap. The list of offenses is the threshold conviction requirement or offense requirement to apply the statute, and predatory acts of sexual violence are otherwise defined in the statute. So I think the objection should be sustained because it assumes – the question assumed otherwise.

MR. DONHAM: I'm sorry, Judge, I don't understand. Are you saying –

THE COURT: Well, in other words –

MR. DONHAM: – what – likely to re-offend to me, to re-offend means to do one of those sexually violent offenses again.

THE COURT: Not exactly. Because you could have a predatory act of sexual violence that's not on that list. Don't ask me what one would be, but . . .

MR. DONHAM: Okay. Well, I don't know [520] what it is that the State's worried about. Maybe I could inquire. Well, I'll withdraw the question. I'll move on.

THE COURT: Well, and –

MR. DONHAM: What's the purpose of this? Are you afraid he's going to flash? Are you afraid he's going to assault –

MR. TOTH: I think it's entirely possible, if phrased the right way, the jury could find flashing a predatory act of sexual violence. It may not be a prerequisite, but it is certainly the type of act that establishes the motive or purpose of victimization, and that's why I object because I think under certain circumstances a jury could find that.

THE COURT REPORTER: I didn't hear that last one.

MR. DONHAM: Sorry. You probably shouldn't have.

THE COURT: To continue that though, you could obviously ask him if he thinks somebody with just a diagnosis of exhibitionism is likely to commit, you know, predatory acts of sexual violence. That would be a better question than is he going to commit one of the things on the [521] offense list.

MR. DONHAM: Okay. Thanks.

(Thereupon, the following proceedings continued in the hearing of the jury:)

Q. (By Mr. Donham) Mr. Eaves, in your professional opinion, if someone is diagnosed with the mental disorder of exhibitionism, would that person be likely to commit a future act of predatory sexual violence?

A. No. Not likely.

Q. I think – would you agree that Mr. Crane did not assault the women in question because he was an exhibitionist?

A. No.

Q. You would – would you agree with that statement?

A. I agree.

Q. In other words, he doesn't assault women because he's an exhibitionist?

A. That's right.

Q. I think you've testified he assaults them because he's got this antisocial personality disorder.

A. Yes.

Q. Okay. I think you've also testified that his antisocial personality disorder does not affect his ability to control his behavior.

[522] MR. TOTH: I'm going to object. I didn't – I don't believe he testified to that on direct examination.

THE COURT: I'm sorry. I'm going to have to hear that question again.

MR. DONHAM: Let me withdraw it and restate it.

THE COURT: All right.

Q. (By Mr. Donham) Mr. Eaves, in your professional opinion, do you think Michael Crane, Crane's antisocial personality disorder, affects his ability to control his behavior?

A. Yes.

Q. Does it impair it to the degree that he can't control his behavior?

A. I don't think so. No.

Q. When you begin a sexual predator evaluation, what things do you want to have or do you need to have to do a sexual predator evaluation?

A. Background information primarily.

Q. Could you be more specific?

A. History.

Q. What kind of history?

A. Criminal history.

Q. That's the first thing you've mentioned. Is that [523] the most important thing that you would want before you would make an opinion?

A. Well, his charges, anything like that. But that would be part of his history I would think criminal history, charges and convictions, that sort of thing.

Q. Did you have any information about his prior criminal history when you began your evaluation?

A. Yes, I think we had them available. I wasn't looking at them right away. We interviewed Mr. Crane the first day he came to the unit or close on to the first day, within a couple days.

* * *

CIVIL ACTION

IN THE DISTRICT COURT FOR THE
TENTH JUDICIAL DISTRICT OF KANSAS
JOHNSON COUNTY, KANSAS

Case No. 97C16409
Appellate Ct. No. 98-82080-A

[Caption Omitted In Printing]

* * *

[41] (Whereupon the jury returned to the courtroom.)

DOUGLAS L. HIPPE,

called as a witness on behalf of the State, after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TOTH:

Q. Would you state your name, please.

A. Douglas L. Hippe.

Q. And what is your profession?

A. Licensed psychologist.

Q. Dr. Hippe, how long have you been a licensed psychologist?

A. Since – 27 years.

Q. Can you tell us a little bit about your educational background?

A. I have a Ph.D. in clinical psychology and also in clinical neuropsychology from the University of North Dakota. Post-doctoral or pardon me – doctoral internship at KU Medical Center. Had taught there for sometime. Taught at the University of Missouri Kansas City. Had been in private practice since that time.

Q. Can you tell us about your professional background [42] there, what you did after your education?

A. Again, I've been in private practice and have done a combination of things related to that practice. A lot of individual therapy, family therapy. In the most recent years, I have more specialized in more difficult cases. I'm the clinical director to the mental health centers in southeast Kansas, have been for 18 years. Do the risk management associated with those facilities. Again, been in private practice and the practice consisted of individual therapy, group therapy, working with adolescents, adults, and some geriatric patients.

Q. You work with sex offenders also?

A. Yes, I have.

Q. Okay. Now, Dr. Hippe, I have your resume that you provided to us, and it's about five pages long. I want to skip through some of it, but you are a member of a number of professional organizations related to the field of psychology; is that correct?

A. Yes.

Q. Have been for many many years?

A. All through the years.

Q. You are also – quite extensively have been published in the area of psychology?

A. Yes.

[43] Q. You testified before, Dr. Hippe, as an expert in the area of making the diagnosis of psychological disorders before?

A. Yes.

Q. Approximately how many times have you testified as an expert in that area?

A. Probably average of six to 10 times a year.

Q. Okay.

A. When I was actually on the stand.

Q. Okay. And so we are talking upwards of a hundred times testifying?

A. Yes. Probably very close.

Q. You indicated, Dr. Hippe, that part of your present duties as clinical director to clinics in the State of Kansas, you do risk assessment?

A. Risk assessment, risk management as clinical director.

Q. Can you tell me what that is?

A. Well, the primary focus is on risk management for both mental health centers. It's looking at the most difficult cases that come to us, whether they be transferred from other states, or come out of Larned or Osawatomie, or through our court system, and looking at

the risk both to the mental health center, to community at large, and then coordinating [44] treatment programs for those individuals if it's within our purview if we can provide services.

Q. Okay. To do the risk assessment portion of it, would that generally involve then meeting with the patient, looking at the patient's background, and trying to make determination for yourself how is the best way to deal with that?

A. Yes. The first steps are as referral we may get releases of information from all of the treatment facilities, correctional facilities that were involved, and start out with that, then do some initial assessments, typically psychological testing in addition to that, and then we have a panel that meets to discuss the case and to discuss treatment options.

Q. I take it that you are licensed in the State of Kansas to diagnosis individuals with psychological disorders?

A. Yes. Both in Kansas and Missouri.

Q. And provide treatment as well?

A. Yes.

Q. Okay. Keep current in the literature?

A. Yes.

Q. You are familiar with the DSM-IV?

A. Yes.

[45] Q. That would be the big red book, correct?

A. Yes.

Q. Sometimes referred to as the Bible of psychologists and psychiatrists?

A. Yes.

Q. Do you use the DSM-IV in helping you make an assessment of an individual when you diagnose them with a mental disorder?

A. Yes. It serves several functions in terms of providing a closer look at the focus of treatment. It's a primary way of communicating information to other institutions. Whether we get records from Osawatomie or Larned, wherever it might be, and if an individual has DSM-IV classification diagnosis, we have a much more accurate idea of what they are, what they've been through, what kinds of things we are looking at. It's a way of providing a good summary of treatment, underlying personality, medical problems, social problems, and the like.

Q. Okay. Dr. Hippe, are you familiar with who Michael Crane is?

A. Yes, I am.

Q. And this would be Mr. Crane seated in the chair over here with the brown shirt on, short sleeve? (Indicating)

[46] A. Yes.

Q. Did you conduct a psychological evaluation on Mr. Crane back in 1994?

A. Yes, I did.

Q. What was the purpose for you conducting that examination back in 1994?

A. It was to provide more information on his psychological and emotional status in and around the time of commission of the crime he was charged with.

Q. That crime, just to set the record straight, was the original kidnapping charge from 1993 at the Movie Exchange video store in Leawood?

A. Yes. I believe there were other charges.

Q. There was also a lewd and lascivious charge that was attached to that where he exposed himself to a woman in a tanning salon earlier that evening?

A. Correct.

Q. That would be his most recent criminal conviction?

A. Yes

Q. And at the time of this event, you were aware, Dr. Hippe, that Mr. Crane had claimed that he may have been insane, or was suffering from a blackout when he committed that offense?

A. Yes.

Q. Did you look into that?

[47] A. Specifically, yes.

Q. Did you – since your initial evaluation in 1994, have you supplemented yourself with information that's been provided to you from the Department of Corrections, from Larned State Hospital, and things of that sort?

A. Yes. I've have a chance to review in detail of the documents they provided to us.

Q. Okay. At this point in time, do you feel comfortable that you have up-to-date information regarding Mr. Crane?

A. Yes.

Q. When you conducted your interview with Mr. Crane, did you conduct an interview with Mr. Crane when you conducted your evaluation back in 1994?

A. Yes. There were multiple interviews.

Q. The purpose of the interview is what?

A. At the time, I was to get a better understanding of the feeling for the dynamics of Mr. Crane, psychological functioning, his emotional functioning, to get in detail reports from him of his functioning at the time of the incident, to get family history, background history, criminal history, and the like.

Q. Okay. Now, Dr. Hippe, when you did your evaluation on Mr. Crane, you ended up forming a diagnosis based [48] on your training and experience as to mental disorders Mr. Crane was suffering from, correct?

A. Yes.

Q. And since that time in 1994, you are aware Mr. Crane has been sent to prison?

A. Yes.

Q. When you were contacted by our office about doing some follow-up work that has to do with the sexual

predator proceeding, did you attempt to go meet and speak with Mr. Crane over at the Johnson County Jail?

A. Yes. I had set up a time to meet with him contact visit.

Q. Did you go ahead and meet with him?

A. Well, we attempted to. We got to the door, and he said his attorney would not allow him to have contact with me.

Q. But did Mr. Crane understand what the purpose of you being there was for?

A. I assume that he did. We did not have a chance to talk about it.

Q. Notwithstanding the fact that his attorney wouldn't let him talk to you, do you feel comfortable that you are in a position today to still make a diagnosis regarding his mental state?

A. I do feel comfortable with the information that I've [49] gotten from Larned Hospital, from prison. There are several updates in there of his functioning, his course of treatment, his behavior during that time, particularly psychological testing, and so I'm comfortable with that information.

Q. Okay. Had you conducted some testing on Mr. Crane yourself back in 1994?

A. Yes. In '94, we did extensive testing.

Q. What kind of testing?

A. It was a rather wide range of testing. We did some personality testing, did intellectual testing, memory

testing, testing for any neuropsychological defects that might be present which would be more of a genetic kind of nature. Since there are – dissociative episodes were claimed, we looked into that by wag of the psychological testing, and memory testing, and the like. So it was a rather detailed evaluation, and I believe a very detailed report, too.

Q. The testing that you did, that's the type of testing that's generally accepted in your field for purposes of making a diagnosis regarding a patient's particular psychological disorder?

A. Yes.

Q. Are you familiar with the Kansas statute regarding [50] sexual predators?

A. Yes, I am.

Q. And I want to direct your attention to that. Do you have a copy of that with you?

A. I did in the materials just that –

MR. TOTH: And I can approach the witness?

THE COURT: Yes.

Q. (By Mr. Toth) Before we get into the statute, let me ask you this, Dr. Hippe. Your diagnosis that you made back in 1994, is it the same diagnosis that you would make today?

A. Relatively, yes. I believe there was some minor change in terms of some of the depression, I think, that we had seen at the time. Bear with me. I think at the time, we had diagnostic impression of a Dysthymic Disorder,

and by my understanding from the records from Larned, that has improved, and as I understand, is not requiring treatment or has not.

Q. Dysthymic Disorder is depression?

A. Yes.

Q. In your opinion, Dr. Hippe, in 1994 and 1998, does Mr. Crane suffer from a personality disorder?

A. Yes, I do.

Q. What is that personality disorder?

[51] A. Antisocial Personality Disorder.

Q. Okay. And that's the finding you made back then, correct?

A. That is correct.

Q. It's the finding that was made in Larned, and finding that you still make today?

A. Yes.

Q. Let's talk about the statute, if we could. The statute defines a sexually violent predator as "a person convicted of or charged with a sexually violent offense", and you know that to be true in this case?

A. Yes.

Q. "And who suffers from a mental abnormality or personality disorder which makes" the person "likely to engage in predatory acts of sexual violence if not confined in a secure facility". Let me ask you about the "who suffers from a mental abnormality or personality disorder

which makes them likely to engage in acts of sexual violence if not confined in a secure facility" part. Do you find Mr. Crane's Antisocial Personality Disorder as meeting that legal criteria?

A. Yes, I do.

Q. Would you explain why you say that.

[52] A. The diagnosis of a personality disorder is based on the enduring traits that an individual has which can be seen either behaviorally or in terms of psychological testing. We see it in their record, particularly the Antisocial Personality Disorder which has a number of characteristics that are very carefully defined in the DSM-IV, and these traits are outside the realm of normality. The kind of things that we would expect in average individuals in our society that cause enduring trouble, enduring difficulties either with the law or psychologically, personally, or in the community in some way.

Q. Okay. There are seven listed patterns of behavior listed in the DSM-IV for Antisocial Personality Disorder. Would that be fair to say?

A. Yes.

Q. Okay. How is it that you look at those seven, and decide whether or not you think somebody has Antisocial Personality Disorder?

A. Again, it's based on the kinds of things that we get from past history, family history, community history, treatment history, offenses charged, allegations, all sorts of things. May be from the history of the individual or their caretakers, or from treatment facilities. We also use information from [53] psychological testing because,

again, these rather enduring character traits, if you will, tend to be very stable across time, and relatively unchangeable.

Q. Okay. When you look at the seven, is there a magic number how many you need to find before you say this person has Antisocial Personality Disorder?

A. Well, DSM-IV specifies that there need to be at least three of the seven present. They can be in any combination.

Q. If I can go through the first criteria listed in DSM-IV, a person who has this, it says "There's a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years". That's kind of the general definition of what Antisocial Personality Disorder is, correct?

A. Yes.

Q. And then it lists criteria. First one is "failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest". Do you find Mr. Crane as falling within that criteria?

A. Very clearly.

Q. Why do you say that?

A. Again, based on his arrest history, charges made. We've got quite extensive – or he has quite extensive [54] background in terms of breaking the law and violating rights of other people.

Q. Okay. The second one is "deceitfulness, as indicated by repeated lying, use of aliases, or conning others

for personal profit or pleasure". Do you find that criteria applying to Mr. Crane?

A. To at least a moderate to serious degree. I would base this on my personal experience with him, and the experience that I see in the reports from Larned. Saw that in Dr. Logan's report as well. In terms of his either minimizing the history of the occurrences of various offenses, whether they be thefts, breaking and entry, sexual kinds of behaviors that are outside the norm. All of these, again, tended to be minimized, or it really didn't happen that way, or there was some other circumstances. When we get the information from our legal system, it's very clear. It was very extensive history.

Q. Is there also – I'm sorry.

A. There were many other times both in my meetings with him a year ago, and in the current updates and evaluations that I've read over the last weeks where it was noted that Mr. Crane had obviously neglected to tell people about numerous occurrences, and both in terms of frequency and severity of the crime so [55] that he lies, yes.

Q. Usually has to do with criminal history, or severity and frequency of his criminal activities.

A. Correct.

Q. Criteria Number 3 "impulsivity or failure to plan ahead". Do you see any of that?

A. His history is replete with those kinds of examples. From the time he was a youngster all the way through to the time of his last arrest and incarceration. We see numerous examples of low frustration tolerance

and impulsivity. I think those are two hallmarks of his behavior.

Q. How old was Mr. Crane when he first started to engage in these type of behaviors?

A. Some of the first references I had seen in the reports – and I didn't go into all of what Dr. Logan had presented, but I recall he had a very thorough and extensive history that matched what I had had, and some ways was even more complete. But extending back to grade school, preadolescence references to age 10. He had been in McCune Home for boys for some extensive time related to out of control behavior.

Q. And he started actually the references, and I think Dr. Logan's report indicates Mr. Crane probably started exposing himself maybe –

[56] MR. DONHAM: Objection. Leading. Object to the leading question.

THE COURT: Sustained.

Q. (By Mr. Toth) Do you know what the records indicate how old Mr. Crane was when he started exposing himself?

A. Again, my first recollection of that kind of behavior did start when he was approximately 10. There were numerous examples of that from that time on from unzipping his pants at a party to peeing on a driveway in public to other types of exposure particularly to women, to girls at that time. That continued on through his history, and increased in terms of both frequency and severity.

Q. Criteria Number 4 is "irritability and aggressiveness, as indicated by repeated physical fights or assaults". Do you see that in Mr. Crane?

A. Yes. And that's also in the history of charges that have been brought against him by our legal system.

Q. Criteria 5 "reckless disregard for safety of self or others". Do you see that criteria?

A. Yes. Again, I think just in the examples that we have from childhood, it continued through adolescence, young adulthood, and up to 1994.

Q. Criteria 6 "consistent irresponsibility, as indicated [57] by repeated failure to sustain consistent work behavior or honor financial obligations".

A. His work behavior, he had worked in landscaping, and I think that was probably some of the longest history. He had made a good living at that point. I had the sense from what he had told me and from Dr. Logan's report in the history there, that at times that would be sporadic.

Q. And finally 7, "lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another".

A. Again, I see that throughout his history, at least the interviews that I had had with him, the subsequent ones that we see from Larned State Hospital. I believe that's reflected in Dr. Logan's report, too. As far as the many omissions and the trying to make light of or excuse his behavior or say it wasn't that serious or just omit.

Q. Right. Okay. That's the seven criteria, so Mr. Crane really to certain respects meets every single one of them, not just three of the seven; would that be fair to say?

A. Yes. Only three are required, and I think that there are probably only a couple of them that if we listed them as "mild", "moderate", and "severe", I would put [58] most of them at "severe", and there were a couple that would be moderate such as employment, I think was – there was some substance there.

Q. Dr. Hippe, Mr. Crane also suffers from Exhibitionism which is a separate disorder apart from Antisocial Personality Disorder?

A. Yes.

Q. Can you explain what that is, Exhibitionism?

A. Exhibitionism typically is a set of behaviors that leads an individual to either expose themselves to other individuals, whether it be male or female, or to engage in those kinds of behaviors in public. They may be sexually related, typically are. There sometimes is felt a drive to do these kind of behaviors to follow through, sometimes related to thrill seeking excitement.

Q. Do you know whether Mr. Crane has indicated either to you or Dr. Logan whether or not he feels like he could control this drive that he gets?

A. I believe that he had said both to me, and I believe Dr. Logan –

MR. DONHAM: I'm going to object. I think it's speculative on anything he may have spoken to Dr.

Logan. Would also be hearsay especially since the witness has already indicated he's not sure by [59] his equivocal answer. We object to that answer.

THE COURT: Well, if you want to lay some more foundation what he told Dr. Logan, or we can confine the question to what he told Dr. Hippe.

MR. TOTH: Okay.

Q. (By Mr. Toth) Do you have any recollection of what he may have told you, Dr. Hippe, about what drives him?

A. Yes. Again, it was that seeking of both stimulation, sense of shock, sense of control over other people. He had said that he felt that he could control that, and felt that that wasn't a problem that he couldn't manage, and that was indicated in one of the Larned reports as well.

Q. Okay. Now, are you aware of whether or not he may have told Dr. Logan that he can't control that behavior, or do you have any independent recollection of that?

A. That, I don't.

Q. We'll take that up with Dr. Logan.

If a person is just an exhibitionist, would it be fair to say that you would not come in here and say they're a sexual predator?

A. Exhibitionism alone would not be the sole basis for saying that an individual is a sexual predator.

Q. What, in your opinion, makes Mr. Crane rise to that [60] level to where you're comfortable in saying that he meets the legal definition of a "sexual predator"?

A. I think a number of things. The sense throughout his record up to the time that I had seen him in 1994 was one of increasing frequency and particularly increasing intensity, and more of a disregard for the rights of others. These were the exhibitionism at that time had gone through the years from some of the examples that I had given to being in parking lots masturbating openly with the door of his car or truck open to the point one time where he was in a parking lot in Independence and was exposing himself, and unfortunately it was a parole officer and he said, "Oh, shit," and ran off. But she recognized him. And then culminating in the charges that he had in 1993.

Q. The person with Antisocial Personality Disorder, are those features that that person has usually changeable over time, or how could you characterize that aspect of it?

A. There's a moderate amount in the literature about treatment of Antisocial Personality Disorder. For the most part, people regard them as extremely difficult to treat, very intractable, not likely to change. There are very enduring kinds of traits. In [61] fact, I have several current books 1996 '97, '98 publications on the antisocial personality that indicate they are the least treatable of the personality disorders. In fact, when these are grouped in a number of studies, they had groupings of the depressive personality, the schizoid personality, and number of other traits that were more readily treated. There were

another group that were more moderately untreatable or treated with a great deal of difficulty, and finally the final grouping of those that felt were significantly difficult to treat was the Antisocial Personality Disorder.

Q. Are you aware of any case studies which would indicate to you how long it takes for intense treatment of the Antisocial Personality Disorder person to take?

A. Well, in my experience with treating Antisocial Personality Disorders, I think the first criterias that you really need very very firm controls, very firm controls over behavior, firm controls over their attendance, and the frequency of treatment preferably daily, preferably in a very controlled setting. The studies that show the best outcomes are those where there is secure residential placement, treatment typically goes from 24 to 36 months in that kind of [62] setting.They find treating in a group setting tends to yield the best results. In fact, some of the earliest studies outside of treating adolescents of which there's another set of literature that really parallels the treatment of adult antisocial disorders was done by the Navy, and the late 60's and early 70's and there was Roanoke Treasure Island in San Francisco, and they had a closed treatment setting, treatment was three years duration that they were committed to it, and they found moderate changes in that period of time. Anything less than that, they found typically either without treatment or a short basis of treatment that there was about an 85 percent recidivism rate as far as reoccurrence of antisocial behaviors.

Q. Without that treatment?

A. Without the treatment.

Q. You are aware having reviewed the records that, for whatever reason, the Department of Corrections did not provide that type of treatment to Mr. Crane when he was in custody, correct?

A. Yes. I understand there were problems with timing with appeals so that he was not afforded that kind of treatment. I believe he had 30 group therapy sessions, which is 30 hours, which is in this case [63] hardly opening the door.

Q. Are you familiar with the Sexual Offender Treatment Program that he would be required to do if he were under state parole as far as the group, going to group once a week, that kind of stuff?

A. Yes.

Q. Do you find that to be adequate?

A. With this severity and looking at the impact on individuals, the aggressiveness towards individuals, impact on them, I would hesitate significantly to look at any kind of outpatient treatment. What we have in both – in Southeast Kansas, the two treatment centers at Columbus and Pittsburgh where we've done sexual offender treatment and this is – I will keep that separate from sexual predators just for a moment. We require their participation in the program, cooperation with the court through probation parole. They are committed to a 24 to 36 month program. This isn't just weekly. They will have as many as 10 sessions a week on outpatient basis. These are the nonviolent offenders.

Q. Right.

A. And with that, and the cooperation, we have a good success rate.

Q. What makes Mr. Crane different is he has –

[64] MR. DONHAM: Objection. Leading.

MR. TOTH: Withdraw.

Q. (By Mr. Toth) Do you characterize him as a violent offender or nonviolent?

A. Violent.

Q. The next part of the statute says "makes the person likely to engage in predatory acts of sexual violence". Do you have an opinion, Dr. Hippe, as to whether or not Mr. Crane's Antisocial Personality Disorder makes him likely to engage in predatory acts of sexual violence?

A. Well, simplistically, the best predictor of future behavior is past behavior unless there's been significant intervention by way of treatment, which there has not been.

Q. Would you dare to give a – based on your professional opinion and training and experience if you were to give a percentage likelihood that Mr. Crane is going to reoffend at this point, what would – would you even hazard to guess, or prefer not to?

A. I would. There are numerous studies up to the present day which indicate a 90 percent likelihood of reoffending without treatment. I know that generally my feeling for our program and our community in southeast Kansas, and I'm sure it's the same here [65] just from my contact with individuals who run programs here, my feeling was 85 percent. I think I'm a little conservative.

Q. And in Mr. Crane's case, the recommendation or the statute says "if not confined in a secure facility". Do you share that opinion?

A. Yes.

Q. Is that because of the violent nature of his offenses?

A. Yes. That point of culmination when he was finally incarcerated. Again, I think his offenses were increasing in daringness and aggressive and impact on the community, and violence towards persons.

Q. Dr. Hippe, you've indicated that you had an opportunity to review a report that was written by Dr. Logan back in 1994?

A. Yes.

Q. Okay. At that time Dr. Logan also made a diagnosis regarding Mr. Crane's personality disorders, correct?

A. Yes.

Q. If I read Dr. Logan's report –

MR. DONHAM: Could we approach the bench?

(A discussion was had at the bench with court and counsel out of the [66] hearing of the jury as follows:)

MR. DONHAM: To the extent this witness used Dr. Logan's report to form his opinion, he would be entitled to use that as a basis, but we have not decided – it would be improper for the State to introduce Dr. Logan's testimony, anticipated testimony through this witness. Can call him in rebuttal.

MR. TOTH: I have him under subpoena. I had Dr. Logan under subpoena. Based on the conversations with Mr. Donham that he was going –

MR. TOTH: Judge, I can rephrase my question without get –

THE COURT: Let's try that.

(The proceedings continued in the hearing of the jury.)

Q. (By Mr. Toth) Dr. Hippe, I'm looking at another report regarding Mr. Crane where the final diagnosis was Personality Disorder Not Otherwise Specified.

A. Yes.

Q. Can you tell me what that is, and what that means?

A. Depending n when the report was written because we shifted from the DSM-III R to the DSM-IV in July of 1995 is when it was first published, and wasn't available until end of the year. If there was a [67] report that was done prior to that time, it would have been DSM-III R, and the criteria were different so that's why I'm –

Q. This would have been written in 1994?

A. Okay.

Q. What does Personality Disorder Not Otherwise Specified mean?

A. The Personality Disorder NOS or Not Otherwise Specified is what I would call a hodgepodge of personality disorder factors. It's used for diagnosis where there

are multiple characteristics that don't fall into any one category. It's not all histrionic, not all borderline personality, not all Antisocial Personality Disorder, not all depressive personality, but it may be a combination of several of those. Typically, back then, what we would do is put Personality Disorder NOS, and put parenthesis with say, antisocial and depressive features. Specify just to alert the individual who is reading the report or the diagnosis that those were the features that we were looking at.

Q. But it is also a personality disorder. It's just not as well defined?

A. It is a personality disorder, and typically it should be defined.

[68] Q. I see.

A. The individual should have specified what features were present or what features were suspected to be present.

Q. Knowing what you know about Mr. Crane and his history and everything that you've reviewed, if another individual in your field came up with the diagnosis of Personality Disorder Not Otherwise Specified as opposed to Antisocial Personality Disorder but everybody is in agreement on criminal history, and things of that sort that we've been talking about, would you find that diagnosis, Personality Disorder Not Otherwise Specified to also meet the legal definition provided for in the Kansas Sexual Predator Act?

A. It certainly could. If it had those characteristics with that kind of history, it would meet those criteria.

Q. Excuse me just a second. Thank you, Dr. Hippe.

MR. TOTH: I have nothing further.

THE COURT: Mr. Donham.

CROSS-EXAMINATION

BY MR. DONHAM:

* * *

[71] Q. The State called you to testify against them?

A. That is correct.

Q. The documents that you reviewed to form your opinion about Mr. Crane as he sits here today in August of 1998, were findings made by not only psychologists such as yourself, but psychiatrists, medical doctors back in 1993?

A. Yes. It was myself. There were psychiatrists, psychologists, there were reports from social workers and licensed Masters level psychologists as well.

Q. In 1993 when you were hired by the State to analyze Mr. Crane, did you reach a conclusion that he understood what he was doing?

A. Yes, I did.

Q. That his actions would have been considered intentional, willful, purposeful?

A. That is correct.

Q. In the documents you reviewed, did you review the Larned report of – I'm sorry – not Larned, but the Department of Corrections report back in 1993?

A. Yes.

Q. Did you review the Larned State Hospital Release Summary back in 1993?

A. I have my entire file here. May I refer to?

Q. Sure.

[72] A. Yes.

Q. That would be a Release Summary from Larned. Attending physician being a Dr. Fernando, a medical doctor, I presume, psychiatrist?

A. Yes.

Q. On Page 1 down near the bottom, it talks about "Axis V Global Assessment of Functioning skill". Do you see that?

A. Is that the July 2nd 1993? I'm sorry. May have picked up the wrong one from Larned State Hospital.

MR. DONHAM: Could I approach the witness?

THE COURT: Yes.

(Respondent's Exhibit D was marked for identification by the Reporter.)

Q. (By Mr. Donham) I'd like the record to reflect I've handed you what's been marked Respondent's Exhibit D. That bottom line, have you seen a copy of that report before? Did you have an opportunity to do that?

A. I would have to look through. I am sure that I had all of the information from Larned State Hospital.

Q. Okay. Down at the bottom of that page, it talks about a global assessment score, does it not?

[73] A. Yes.

Q. What was his global assessment score at the time he was evaluated in 1993?

A. It says his current GAF which is Global Assessment Functioning is 45.

Q. Could you explain for the jury what is meant by that, Global Assessment of Functioning?

A. The Global Assessment of Functioning is a measure going from roughly zero points to a hundred points on a scale indicating how well an individual is adapting to his environment, is handling his environment, that type of thing, and I don't have the DSM-III R here. I could give you the information from the DSM-IV which is identical except that it runs from zero to 99 rather than a hundred. Okay. A GAF – and they run these in groups. This particular one would be for the 41 through 50. It's considered serious symptoms. This would be such as suicidal ideations, severe obsessional rituals, frequent shoplifting, or any serious impairment in social, occupational, or school functioning, such as no friends, or being unable to keep a job.

Q. Thank you. Now, that's out of the DSM-IV; is that correct?

A. This is out-of the DSM-IV, but it is basically [74] identical to the DSM-III R. We would find the same descriptor.

Q. So if we are going to give any validity to the analysis done by the psychiatrist in 1993 at that time when they evaluated him, he showed serious symptoms, serious impairment, and social, occupational, school functionings, serious meaning suicidal, obsessional rituals, frequent criminal activity?

A. Yes.

Q. And doing your opinion on him this time, were you given a copy of the report that was compiled on Mr. Crane prior to him being released from prison by Ms. Janese Williams? It would have been entitled the "Clinical Service Report".

A. Yes.

Q. I would like to direct your attention to Page 5 of that report under "Diagnostic Impression". You have that page?

A. Okay. Yes, I have it.

Q. I suppose as a way, we probably ought to flip over to Page 6 – this report was prepared by Ms. Janese Williams, and she's a licensed Master level psychologist; is that right?

A. Correct.

[75] Q. And it was reviewed by her boss, Ms. Charlene Donovan who is a Ph.D. and a licensed Master level psychologist?

A. Correct.

Q. Going back to Page 5, it appears that in December of 1997, his Global Assessment of Functioning was what?

A. She has it as "63".

Q. Where would that fall on the Global Assessment of Functioning scale?

A. This indicates mild symptoms such as mild insomnia, depressed mood, or some difficulty in occupational or school functioning such as occasional truancy or theft within the household, but generally, functioning pretty well, and has some meaningful interpersonal relationships.

Q. Thank you. Is it safe to say in the roughly five years that Michael Crane sat in prison that the diagnosis of his ability to get along in society has improved?

A. Well, I think very clearly what it states is that prior to this time, he was not functioning well, and after this period of time in prison, he, in very structured situation, functions at a level where there are still mild symptoms.

Q. I'll ask you this. You do some general psychology [76] work, I suppose?

A. Oh, yes.

Q. If you have a child, some parents come to you, and they have a child that repeatedly does things that they don't want the child to do, and you ask the parents, "Have you ever punished the child", and they say "no",

has it ever come to pass that the first time the child really gets punished that they change?

A. Well, depending on the severity of the symptoms. If we are looking at a child who has very severe symptoms, it's unlikely it's going to change at that point. If you are talking about a child who is relatively easy to manage, is a good kid, he gets good grades, he generally has good social relationships, if he gets his hand in the cookie jar and you slap it, yeah, he might respond.

Q. So it's possible you suppose that serving five years in the penitentiary has taught Michael Crane a lesson?

A. Well, I think, based on his personality, that's very unlikely.

Q. I see. Well, in other words, you would take an objection to the reports prepared by the psychologists such as yourself, same level as yourself at Larned – I'm sorry – Department of [77] Corrections?

A. Two exceptions. Number 1, they are not at the same level. These individuals are licensed Master Degree psychologists who do not have the privilege of diagnosing, treating or the like in the State of Kansas. Number 2, I do agree with what they say that in a prison setting and structured setting where the rules are clear, where there's no opportunity or little opportunity to act out without some real significant consequences, he does much better. I think that's what we are trying to say. That's what I'm trying to say.

Q. In your Bible GAF – I'm sorry – DSM-IV, on Page 30 where it discusses what is meant by Axis V Global

Assessment of functioning, does it not say in the very first sentence that the Axis V GAF score is useful in predicting outcome?

A. It says it's useful in treatment planning and measuring impact, and predicting outcome. This is for report in the clinician's judgment of the individual's overall level of functioning, and again, this is with respect to psychological, social, and occupational functioning. It's not restricted to psychological and emotional functioning, but it's a global assessment.

[78] Q. Let's go back to the Clinical Service Report. Do you have it there in front of you?

A. Yes.

Q. If I understand this correctly, this Clinical Service Report was prepared for the Commitment Review Committee? Be right on the front page.

A. That is correct.

Q. That report is prepared specifically to be turned over to a review committee composed of prosecutors to determine whether or not the Attorney General should consider filing a Sexual Predator action, isn't it?

A. Yes, that's correct.

Q. Back on Page 6 in the last full paragraph before it gets to "upon release" and has a number of items, the last sentence where it starts with "Mr. Crane", I believe it says "Mr. Crane has not been a management problem while he's been incarcerated", right?

A. That's correct.

Q. After it reports and the following paragraph "upon release" it recommends that he "complete a structured sex offender treatment program"; is that right?

A. That is correct.

Q. "Participate in mental health counseling to continue to improve his stress management" Number 5?

A. Yes. That is correct.

[79] Q. "Seek and maintain stable employment"?

A. Yes.

Q. There was an additional evaluation performed by the Department of Corrections itself independently of that. I don't know if you have a copy of that. It's dated December 9 of 1997. It was our Exhibit C that I showed you earlier. I don't know if you still have that or not. Maybe I didn't show you C.

A. I don't believe. I have D.

MR. DONHAM: Could I approach the witness for a moment?

THE COURT: Yes.

Q. (By Mr. Donham) Doctor, if you got a copy of this, I would like, if you could find yours. I want to refer to it.

A. If I could look at it just for a second. I don't believe that I have a copy of this. Yes, I do.

Q. Ready?

A. Yes.

Q. Like to turn over to Page 2. It talks about the pre-release reintegration. Are you familiar with the scoring they do on that?

A. This is on –

Q. Page 2.

A. Okay.

[80] Q. Kansas Department of Corrections Evaluation and Classification Report December 9 of 1997.

A. I'm sorry. What I have here is the Evaluation Classification Report from 1-20-98. I have the next month.

MR. DONHAM: Could I approach, Judge?

THE COURT: Yes.

Q. (By Mr. Donham) If you would just read to the jury, please, the pre-release reintegration scores Mr. Crane had. This is on our Exhibit D.

A. Okay. The pre-release reintegration percentage percent scores for effective employability skills is 85 percent. Basic independent living skills is 100. Banking credit skills 100 percent. Health, safety, and nutrition 88 percent. Community living was 100 percent. Human relations was 100 percent. And with the total average percentage being 93 percent.

Q. Thank you. There's a sentence under there – is there a pre-release reintegration program required?

A. It said no total score above 85 percent.

Q. Thank you. So it's safe to say that the people who evaluated Mr. Crane from the Department of Corrections, before releasing him, found that he scores a hundred percent in human relationships at the time of their evaluation, and they did not feel [81] it was necessary to put him through a reintegration program. Would you agree with that?

A. Well, as best I know. If that was what their recommendation was, yes. If I might.

Q. I'm sorry, sir. And I would like to reapproach the – again, hand you our Exhibit D and Page 10, there's a summary of needs, and I'm sorry but I've highlighted there. It has to do with mental health needs. If you would read the jury that portion.

A. He has mental health needs, subset is intensive mental health placement. It says "no". Mental health counseling, it says "yes".

Q. Thank you. Is it safe to say that the people who did a diagnosis on him before releasing him said that while they feel he needs mental health counseling, he does not need intensive mental health placement?

A. All that I can say is –

Q. Just "yes" or "no".

MR. TOTH: Object.

A. No. I have to qualify what I say. I'm sorry.

MR. DONHAM: Withdraw the question.

THE COURT: Very well.

Q. (By Mr. Donham) Dr. Hippe, in the DSM-IV, there's a section on the Antisocial Personality Disorder that talks about persons growing out of the effects of the [82] Antisocial Personality Disorder, and I realize that's not the language that you, as a trained psychologist, would use, but we're here to talk to the jury, and would you agree that the DSM-IV recognizes that as a person approaches their fourth decade of life, that on the average, people begin to lose this Antisocial Personality Disorder feature?

A. I'm very familiar with the literature on Antisocial Personality Disorder both pre-fourth decade and post-fourth decade, and there is some evidence and some suggestion that between the ages of 45 and 55 – I should say post-age 45, that there is some mellowing of some of the antisocial traits. It has, however, not been substantiated by research.

Q. On Page 648 of the DSM-IV – do you have your DSM-IV?

A. I don't have the large one. I have my summary.

Q. Page 648?

A. Yes.

Q. Under the heading "Course"?

A. Yes.

Q. The folks that put the DSM-IV together, I believe, say that Antisocial Personality Disorder "has a chronic course but may become less evident or remit as the individual grows older, particularly by the fourth decade of life"?

[83] A. Yes.

Q. . The first decade of life is when you're from zero to 10. The second would be from 10 to 20. 20 to 30 is your third. So by the time you get to 30, you're at your fourth decade. Would you agree with that? In other words, 30 to 40 is the fourth decade of life. It's the fourth. When the analysis in July of 1993 were done on Mr. Crane, he was about 31 years of age. He had just entered his fourth decade. He's now 37. You haven't interviewed him since 1993. Is it possible that the DSM-IV could be right, and that his Antisocial Personality Disorder could be on the decline?

A. Well, as I said before, I think particularly with respect to the Antisocial Personality Disorder, without treatment, it's extremely unlikely to decline.

Q. Does that DSM-IV paragraph specifically say that it declines if, and only if treatment is applied?

A. It says that the "Antisocial Personality Disorder has a chronic course" which is what I've spoken to "but may become less evident". Doesn't say "will become". Says it "may become". That's a real iffy probability or possibility. It's not even probability. They don't state it as saying there's a

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CIVIL ACTION

IN THE DISTRICT COURT FOR THE
TENTH JUDICIAL DISTRICT OF KANSAS
JOHNSON COUNTY, KANSAS

Case No. 97C16409
Appellate Ct. No. 98-82080-A

[Caption Omitted In Printing]

* * *

THE COURT: All right. Thank you.

Next is the charging instruction which is after Pattern Instruction 57.40.

MR. TOTH: Judge, the only thing we can say at the end of Section 2, we think it's probably appropriate to put in the language, "if not confined in a secure facility". I think that PIK instruction may have been thought up at the time when the statute did not have that language in there. The statute we're going under has that language.

THE COURT: I wondered about that.

MR. TOTH: It's been an issue in a case we've got presently on appeal when we didn't do that.

MR. DONHAM: Which one we talking about?

THE COURT: Burden of proof 57.40.

MR. DONHAM: This is the claim or the elements that must be proven?

THE COURT: Right.

MR. DONHAM: Well, we have an objection [112] to the language of Part 2. Judge, our objection is simply that I believe these PIK instructions have remained unchanged even though the *Kansas v. Hendricks* decision has come down. I think a reading of that opinion, it should be clear that the U.S. Supreme Court stated that they were deciding the issue, i.e. the constitutionality of the statute based solely upon the *Hendricks* case. I think they said that there our decision rests upon the fact pattern in *Hendricks* alone, and they mention in seven places whenever they talk about the mental abnormality, they always qualify that by the language of, for instance, on Page 2,081 of their opinion. To the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's inability to control his dangerousness, the Kansas Act sets forth comparable criteria. I think, Judge, that any instruction to the jury that does not impose that level of volitional impairment avoids the holding of the *Kansas v. Hendricks* decision. That's the issue that we have raised throughout. On Page 279 in their opinion, they are talking accordingly, states have in certain narrow circumstances, provided for the forcible civil detainment of people who are unable to control their [113] behavior, and thereby pose a danger to the public health and safety. Over on Page 2,080 where they're saying "a finding of dangerousness standing alone is not enough", they talk about – they say that in addition to a finding of dangerousness, quote, we have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor such as a mental illness or mental abnormality. And there's a bunch of citations. These added

statutory requirements serve to limit involuntary civil commitment to those who suffer from a volitional impairment rendering them dangerous beyond their control. The Kansas Act is mainly akin with these other civil commitment statutes. It requires a finding of future dangerousness, and then links that finding to the existence of a mental abnormality or personality disorder that makes it difficult, if not impossible, for the person to control his dangerous behavior. The precommitment requirement of a mental abnormality or personality disorder is consistent with the requirements of these other statutes that we have upheld in that it narrows the class a person's eligible for confinement to those who are unable to control their dangerousness. I think – any level, I [114] think, reducing the burden on the State so that they don't have to prove that Mr. Crane's volitional control is impaired to the degree he can't control his dangerous behavior circumvents the very reason we're here to determine whether he needs to be committed for mental abnormality.

THE COURT: Have you seen the definitions which are set out down in 57.41?

MR. DONHAM: You are talking about the proposed instruction, the one that's been modified?

THE COURT: Proposed instruction that sets out definitions, including "mental abnormality", "personality disorder", "volition" and "volitional".

MR. DONHAM: I have –

THE COURT: What else would you add to 57.40?

MR. DONHAM: What I add. I would restate Number 2 to read that the Respondent suffers – I'll take it right out of the U.S. Supreme Court decision. That the Respondent suffers from a mental abnormality or personality disorder that impairs his volitional control to the degree that he cannot control his dangerous behavior.

THE COURT: What's the State say here?

MR. TOTH: Well, Judge, that has a lot [115] to do with the Motion in Limine that I filed, and you want me to go ahead and make my argument now?

THE COURT: I suspect – I think it's a separate issue. I think it might be – there might be some room for argument here. Why don't you confine it to the instructions right now.

MR. TOTH: The instruction accurately states what the statute says, and the statute, as a whole, is what the Supreme Court addressed in the *Hendricks* case. It's my position that – and I do believe this because this has been an issue that has – we have been fighting with in this case ever since we filed it that Mr. Donham is selectively interpreting what the Supreme Court is saying in that case, and he just quoted to you the Supreme Court where they said the Kansas statute thinks – the finding to existence of mental abnormality or personality disorder which makes it difficult, not impossible for a person to control his behavior. Unable to control his behavior does not mean the same thing as volitional impairment. Unable to control behavior means can't control their behavior or won't control their behavior. Since we are following what the statute says in the instruction, and the

PIK set it out, I don't have any problem with it. I think it's [116] an appropriate way to deal with it.

MR. DONHAM: I would like to read a couple more passages from U.S. Supreme Court decision. This would be on Page 2081. They are talking about the individual is being unable to control their behavior, and the opinion says that, quote Hendricks even conceded that when he becomes stressed out, he cannot control the urge to molest children. This admitted lack of volitional control coupled with a prediction of future dangerousness adequately distinguishes *Hendricks* from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings, and on Page 2083, where Hendricks was apparently arguing about how long he might have to serve, the Court said this requirement, again, demonstrates that Kansas does not intend an individual committed pursuant to the act to remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness. I understand there's always room for argument as to what U.S. Supreme Court meant. When they say something seven times, Judge, I don't think it's dicta.

MR. TOTH: Only to that I would say that I think, and there's nothing in the record to [117] indicate this, but I'm telling you, based on my past experience, pedophilia like Mr. Hendricks was suffering from is an Axis I mental abnormality. It is not a personality disorder. It is – pedophilia is something that affects a person's volitional control to the point where they cannot control it. This is a completely different situation, and the statute contemplates both Axis I mental abnormality and Axis II personality disorders.

THE COURT: I'm not sure that I'm in a position based on the record or my own knowledge to make that kind of distinction. I have read and reread the *Hendricks* opinion, highlighted the exact same portions that you have read into the record here today trying to figure out if the U.S. Supreme Court intended a limitation on the Kansas Sexual Predator Act as opposed to analyzing how the act was applied in Mr. Hendricks' specific case. And I think I understand and I appreciate Respondent's argument here, and there is certainly supporting language in the opinion. On the other hand, language that discusses this point doesn't consistently support Respondent's position. There is a considerable distinction between the concept of a mental abnormality which renders the Respondent unable to [118] control his behavior from a personality disorder that quote, prevents them from exercising adequate control over their behavior. I don't find the opinion in *Kansas v. Hendricks* to limit the applicability of the Kansas Act in the way Respondent urges. And so therefore, I would decline to add that additional language to the 57.40 elements instruction. Having said that, I do think it's appropriate to give the jury what definitions we can of "mental abnormality" and "personality disorder", and at least definition of "mental abnormality" goes into this same – approaches that same kind of analysis that there is lack of volition in the commission of sexually violent offenses. I do not see that definition as necessarily being applied to the personality disorder side of the statute, and I think that may be at the heart of the argument here, and I don't know how to resolve it except to follow the statute and the Pattern Instructions, and that issue may well have to be resolved on appeal by a

higher court, but I don't find in State v. – *State of Kansas v. Hendricks* the Supreme Court opinion direction that would lead me to think that we would leave out the personality disorder part of the statute. Does that make any sense?

[119] MR. DONHAM: I'm sorry. You lost me. Are you saying that there's a distinction between the use of the term "mental abnormality" or "personality disorder", whereas volitional control is applicable to mental abnormalities? It's not applicable to personality disorder?

THE COURT: I think that may be what the statute says.

MR. DONHAM: I think that was the issue, wasn't it, that *Hendricks* raised was that because they couldn't say he had a mental illness, he shouldn't have to go through the program that they could – very first thing Supreme Court said was, "we don't care what kind of title you hang on this mental infirmity, the State is free to pick what kind of mental infirmity they want". The important thing they reiterated over and over is that it's constitutional to involuntarily commit people civilly only in very limited circumstances. You can't commit them because they've been bad in the past. You have to commit them because they're crazy, they've got some real genuine mental disorder that affects their volitional control. Otherwise, it's just another commitment for prior bad acts. If all they can say about a guy is "well, he's got Antisocial Personality [120] Disorder, so we can lock him up because that doesn't require any kind of showing of a lack of volitional control", that's a life sentence based on the fact that he's been convicted before. Life.

THE COURT: Well, I don't mean to argue with you, but the other element of that is that he is "likely to engage in future predatory acts of sexual violence". That's what distinguishes the act hopefully from the garden variety felony. I think the language "if not confined in a secure facility" is statutory, and ought to be a part of Paragraph 2. Again, I think Respondent has made a thorough record on this point, and I acknowledge that it is very difficult, and I don't find the legal basis to make that change in the statute in this court.

The next instruction is simply that one that "The term 'sexually violent offense' includes Aggravated Sexual Battery".

MR. DONHAM: I'm sorry, Judge. For the record, we object to the charging instruction, which I'm sitting here kind of numb. I missed that. I want the record to reflect we object to the charging instruction simply saying that he is likely to engage in predatory acts, and that he's had a prior conviction. I do have one other objection. Without

* * *

[131] requests for additional instructions?

MR. TOTH: Not by the State.

MR. DONHAM: We have a couple. Since there's been a lot of testimony in this matter about acts which have led to criminal convictions, we would ask for four additional instructions to be given. One is the criminal PIK 54.01 "ordinarily a person intends all the usual consequences of his voluntary acts". Do you want me to read that into the record?

THE COURT: That's not necessary.

MR. DONHAM: Do you have a copy of it?

THE COURT: Yes.

MR. DONHAM: And the only change that I would ask to make is that since this PIK was written with the idea of a criminal jury trying to decide if the State met its burden, the language in the current instruction says "determining whether the state has met its burden to prove the required criminal intent of the Respondent". I think you probably just strike "required criminal".

THE COURT: I'm not sure what you would even address. Are you talking about addressing prior bad acts?

MR. DONHAM: This may be a carry-over to our original argument that if there is to be [132] involuntary commitment to some mental disorder, and not just a subsequent incarceration for criminal acts, then there has to be some – there has to exist something that has a life of its own outside and beyond just the criminal nature of an individual and is intent to commit a criminal act. I have a hard time vocalizing this, Judge, because I'm trying to work around your earlier decision in this, but if this is an involuntary commitment procedure for some mental problem that needs to be addressed, then the State must be arguing that that mental problem has caused him to behave in a way in the past that is not intentional. There's been a lot of evidence introduced in this case that his actions were intentional; to wit, he's done a number of things for which courts have found him guilty of criminal offenses, and we're asking for the definitions or the jury

instructions that address the fact that, for instance, in order for Respondent to be guilty of a crime, the State must prove that his conduct was intentional. Intentional means willful and purposeful and not accidental. There are about two or three – or two only I guess instructions that deal with that. One is 54.01 and one is 54.01a. So Judge, it's our position that if there's not [133] something there that is making Michael Crane – if there's something there that's making Michael Crane behave in a way that isn't intentional, it's a subject for involuntary commitment. If it's absent, then there's no need for involuntary commitment. If it exists, then the fact that he's acted intentionally in the past tends to offset the evidentiary value of the State's evidence about prior criminal acts.

THE COURT: I don't think it's appropriate to give either 54.01 or 54.01a in this case. In fact, I go so far as to say it would be error to give them those instructions. I understand, I believe, position of Respondent's understanding I've denied his request for some other instructions here, but I won't give them intent instructions in this case.

MR. DONHAM: Let me try this, Judge, if I may. If the Sexual Predator proceeding is to go like this, then aren't we really having a separate hearing that would be more properly called a"habitual criminal commitment act" –

(Reporter recharging machine.)

MR. DONHAM: In other words, this whole case, when we start eliminating absence of volitional [134] control because of a mental abnormality, and all the jury is left to find is that, and the person has been a mean

person repeatedly, he goes down to Larned. Antisocial Personality Disorder, you've heard testimony from Dr. Mabugat and Mr. Ken Eaves. Actually you've seen it in our motions. It was in their depositions. Dr. Mabugat said over 75 percent of the people in prison have Antisocial Personality Disorder. Ken Eaves thought it was at least 60 percent. If that's all the State has to prove, then this really isn't an involuntary commitment for the mentally ill. It's some sort of habitual criminal act in the skies where we come back after the person has finished his or her prison sentence, and simply have a couple of experts say they got Antisocial Personality Disorder, and we send them off to Larned.

THE COURT: I'm not here to defend the Kansas Sexual Predator Act. I'm trying to follow the law. I don't really see how those remarks go to proposed instructions on intent, and I decline to give them. I acknowledge your frustration with this. I'm not here to defend the act. I'm trying to do what the case law and the statute says, and I think applying those leads me to a fairly simple set of instructions as opposed to a complex one.

[135] MR. DONHAM: There's no treatment for that, Judge. How can you treat a person's prior history? That's all it's based on. Commitment proceeding is based upon the fact – unless what I'm getting back – I'm trying to reinforce my argument why. I think the Supreme Court said this has to be limited to those people who have a volitional control problem. If we don't limit it to the people with a volitional control problem, all we're doing is just remanding people back to some form of custody because there is no defense to the fact that a person's part of that 75 percent group of sex offenders in prison who

have an Antisocial Personality Disorder. I mean, and then the experts get on and say, "He's done it before, he'll do it again". What's to be repaired by mental health specialists if the proof is like everyone else, and you had priors? How do you make your priors go away? I understand, Judge. I'm being frustrated. It seems like a decision to open the application of this act to people who don't have a volitional control problem defeats the purpose of a Sexual Predator Act. Involuntary commitment for mental treatment.

THE COURT: Any other instructions we need to address?

[136] MR. DONHAM: Just, we would like our objections noted, Judge, as to the denial of giving intent instruction so we can argue to the jury that Mr. Crane knew full well what he was doing, and the Court found he acted willfully and intentionally at the time. There was one other – I don't know that matters now. It was a prior crimes instruction that I had photocopied for typing, and I'm not sure what Kathy typed here. It looks like she's modified it. It's the one that is the warning instruction for K.S.A. 60-455 evidence. PIK 52.06.

THE COURT: Right. I don't think it's appropriate to give 52.06. The evidence in such a case as this is relevant according to all expert opinion to his future behavior. It would be inappropriate to tell the jury that it can only be considered for purposes of proving Respondent's intent. Anything else on instructions?

MR. TOTH: No, sir.

MR. DONHAM: We would object to not giving that instruction.

THE COURT: Somewhere I had a motion from the State as to arguing.

MR. TOTH: I have another copy.

THE COURT: Shall we take that up?

[137] MR. TOTH: We have argued, I think, most of these – this issue within the last 45 minutes or so. I am just very concerned that the jury is going to be misled that in order to find somebody be a sexually violent predator that if they suffer from a personality disorder that it has to be the type of personality disorder that affects their volitional control. I do believe I've stated my arguments with respect to my interpretation of the Supreme Court opinion, and it's my understanding that the Court agrees with that position, and I only drafted that Motion in Limine based on statements Mr. Donham made in opening argument, so I'm concerned about it. I don't know what to do about it other than to bring it to the Court's attention. I would like some direction on that issue. It's obvious that we disagree on our interpretation of the statute, and I don't want there to be confusion about it.

THE COURT: You want to respond?

MR. DONHAM: I'm sorry that this issue is going to be decided now at jury instruction time now that we've made our opening and more or less made our approach to the case. It's been our good faith understanding all along that the U.S. Supreme Court was restricting the application of the act to a [138] limited number of

people. We disagree with Mr. Toth's impression and the Court's ruling. Doesn't leave us an awful lot of room, places to go in our closing. As an officer of the court, I can't go out there and argue to a jury something that's contrary to your holdings, I suppose. I think that's inappropriate on my part. I disagree with your holdings, but I will not – I can't go out there and argue something that you would instruct them is incorrect.

THE COURT: Well, I appreciate that response and those remarks. I don't think you can go out there and argue the law is something different from what I'm telling them it is in instructions. On the other hand, obviously Respondent's counsel is entitled to argue that these same points as applied to the facts of the case which are these past crimes weren't committed because of a personality disorder, they were committed because he's a bad guy and doesn't care how his actions affect people, that's clearly available for argument. That's different from saying that the law is something different than is set out in instructions. I don't want to overstate the limitation here. You can certainly obviously argue how the law as given in the [139] instructions applies to facts.

Anything else before argument?

MR. TOTH: No, sir.

THE COURT: You still want 45 minutes?

MR. DONHAM: Yes.

THE COURT: Okay. You want to split yours?

MR. TOTH: That's fine.

THE COURT: If you go over half, I'll take it off your back end. If you quit early, you can still have the full 22 and a half minutes in your final closing if you need it. What kind of warning do you want?

MR. TOTH: Just a minute.

THE COURT: Mr. Donham, two minute warning?

MR. DONHAM: That would be fine, Judge.

(Whereupon the proceedings continued in the courtroom, in the presence of the jury.)

* * *

IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS

IN THE MATTER OF THE CARE
AND TREATMENT OF MICHAEL
T. CRANE

CASE NO.
97C 16409
DIVISION
NO. 1

INSTRUCTIONS TO THE JURY

(Filed Aug. 13, 1998)

PETER V. RUDDICK
DISTRICT COURT JUDGE
DIVISION NO. 1

INSTRUCTION NO. 1

It is now my duty as Judge to instruct you in the law that applies in this case, and it is your duty as jurors to follow the law as I shall state it to you. You should construe each instruction in light of and in harmony with the other instructions, and you should apply these instructions as a whole to the evidence. The order in which the instructions are given has no significance and is no indication of their relative importance.

Insofar as the jury is concerned, you may consider as evidence whatever is admitted in the trial as part of the record, whether it be the testimony of witnesses in person or an article or document marked as an exhibit or other matters admitted, such as an admission, agreement, or stipulation.

At times during the trial, the Court ruled upon objections to the admission of certain things into evidence. Questions relating to the admissibility of evidence are solely questions of law for the Court and you must not concern yourselves with the reasons for its rulings. In your consideration of the case, you must draw no inferences from these rulings and you must consider only the evidence which is admitted by the Court.

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence, you should disregard any such utterance that has no basis in the evidence.

INSTRUCTION NO. 2

You must weigh and consider this case without favoritism for or prejudice against either party. You must not be influenced by anything not within the issues of the case. Sympathy should not enter into your deliberations.

Neither in these instruction nor in any ruling, action or remark that I have made during the course of the trial have I intended to interpose any opinion or suggestion as to how I would resolve any of the issues of this case.

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.

INSTRUCTION NO. 3

Certain testimony has been given in this case by experts; that is, by persons who are specially qualified by experience or training and possess knowledge on matters not common to persons in general. The law permits such persons to give their opinions regarding such matters. The testimony of experts is to be considered like any other testimony and is to be tried by the same tests, and should receive such weight and credit as the jury deems it entitled to, when viewed in connection with all of the other facts and circumstances, and its weight and value are questions for the jury.

INSTRUCTION NO. 4

As to any alleged act of wrongdoing, the law places the burden upon the State to identify the respondent. The law does not require the respondent to prove he has been wrongly identified. In weighing the reliability of eyewitness identification testimony, you first should determine whether any of the following factors existed and, if so, the extent to which they would affect accuracy of identification by an eyewitness. Factors you may consider are:

1. The opportunity the witness had to observe. This includes any physical condition which could affect the ability of the witness to observe, the length of the time of observation, and any limitations on observation like an obstruction or poor lighting;

2. The emotional state of the witness at the time including that which might be caused by the use of a weapon or a threat of violence;

3. Whether the witness had observed the respondent on earlier occasions;

4. Whether a significant amount of time elapsed between the crime charged and any later identification;

5. Whether the witness ever failed to identify the respondent or made any inconsistent identification;

6. The degree of certainty demonstrated by the witness at the time of any identification of the accused; and

7. Whether there are any other circumstances that may have affected the accuracy of the eyewitness identification.

INSTRUCTION NO. 5

A person found to be a sexually violent predator shall be civilly committed for control, care and treatment in an appropriate facility until discharged according to law.

The nature and length of any civil commitment which may follow in the event you find the respondent is a sexually violent predator is of no concern to you as jurors.

INSTRUCTION NO. 6

The State has the burden to prove that respondent is a sexually violent predator. The test you must use is this: If you have a reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find for the respondent. If you have no reasonable doubt

as to the truth of any of the claims required to be proved by the State, you should find for the State.

INSTRUCTION NO. 7

The State alleges the respondent is a sexually violent predator. The respondent denies the allegation.

To establish this charge, each of the following claims must be proved:

1. That the respondent has been convicted of Aggravated Sexual Battery, a sexually violent offense; and

2. That the respondent suffers from a mental abnormality or personality disorder which makes the respondent likely to engage in future predatory acts of sexual violence, if not confined in a secure facility.

INSTRUCTION NO. 8

The term "sexually violent offense" includes Aggravated Sexual Battery.

INSTRUCTION NO. 9

The following definitions of words and phrases are applicable in this proceeding:

"Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes a person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.

"Predatory" means acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization.

"Personality disorder" means a condition recognized by the American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (4th Ed. 1994) [DSM IV], and includes antisocial personality disorder.

"Likely" means more probable to occur than not to occur.

"Volition" means act of willing or exercise of the will.

"Volitional" means having or exercising the power of volition.

INSTRUCTION NO. 10

Once you retire to the jury room, you will be provided with these Instructions. All future communications to the Court should be in writing and delivered to the Bailiff or taken up in the Courtroom and recorded by the Court Reporter. You will find a call buzzer located by the door in the jury room should you need the Bailiff for any reason.

INSTRUCTION NO. 11

Upon retiring to the jury room, you shall first select one of your members as Presiding Juror. The Presiding Juror will preside over your deliberations and will speak for the jury in Court.

A verdict form with special question is provided for you in these Instructions. In order to find respondent to be a sexually violent predator all twelve of you must agree on it. The Presiding Juror will fill in the answer to the special question upon which you all agree and then sign the verdict form.

You will now listen to the arguments of counsel whose right it is to discuss the evidence and the law.

Your verdict must be founded entirely upon the evidence admitted and the law as given in these Instructions.

Dated this 12th day of August, 1998.

/s/ Peter V. Ruddick
PETER V. RUDDICK
DISTRICT COURT JUDGE
DIVISION NO. 1

VERDICT

We, the jury, make the following answer to the question submitted by the Court: Is the respondent, MICHAEL T. CRANE, a sexually violent predator?

X Yes ___ No

Dated this 13th day of August, 1998

/s/ Jeffrey C. Cook
Jeffrey C. Cook
Presiding Juror

Supreme Court, U.S.
FILED
JUN 15 2001
OFFICE OF THE CLERK

(3)

No. 00 – 957

IN THE

Supreme Court of the United States

In the Matter of the Care and Treatment of Michael T. Crane

STATE OF KANSAS,

Petitioner,

v.

MICHAEL T. CRANE,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF OF PETITIONER

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159 pp

QUESTION PRESENTED

Whether the Fourteenth Amendment's Due Process Clause requires a State to prove that a sexually violent predator "cannot control" his criminal sexual behavior before the State can civilly commit him for residential care and treatment?

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OPINION BELOW

The July 14, 2000, decision of the Kansas Supreme Court is reported at 269 Kan. 578, 7 P.3d 285, and is included in the appendix to the State's petition for a writ of *certiorari* ("Pet. App.") at 2a-20a.

JURISDICTION

This Court's jurisdiction to review the final judgment of the Kansas Supreme Court is invoked pursuant to 28 U.S.C. § 1257(a). The Kansas Supreme Court issued its decision in this case on July 14, 2000. *See* Pet. App. 2a-20a. Kansas filed a timely petition for reconsideration which that court denied on September 26, 2000. Pet. App. 1a. Kansas filed its petition for a writ of *certiorari* on December 12, 2000, and this Court granted the petition on April 2, 2001.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The "Due Process Clause" of the Fourteenth Amendment provides in pertinent part that

> nor shall any State deprive any person of . . . liberty . . . without due process of law . . . .

The Kansas Sexually Violent Predator Act, Kan. Stat. Ann. 1999 Supp. § 59-29a01 *et seq.*, is set forth in full in the appendix to this brief. Section 59-29a02(a) defines a "sexually violent predator" as

> any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence.

The Act, in § 59-29a02(b), defines "mental abnormality" as

> a condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent

> offenses in a degree constituting such person a menace to the health and safety of others.

The Act defines the phrase "likely to engage in repeat acts of sexual violence," in § 59-29a02(c), to

> mean[] that the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others.

STATEMENT OF THE CASE

1. *Nature of the Suit.* This case is an involuntary civil commitment proceeding against Michael Crane under the Kansas Sexually Violent Predator Act ("Act"). Kan. Stat. Ann. § 59-29a01 *et seq.* Most recently, Crane has prior convictions for lewd and lascivious behavior (exposing himself to a tanning salon attendant) and aggravated sexual battery (physically attacking a video store clerk, attempting to force her to perform oral sex, and threatening to rape her), arising from two separate incidents. Pet. App. 2a-3a. This civil commitment proceeding was initiated at the end of Crane's sentence on the latter charge. *Id.* at 3a. Ultimately, the trial court ordered Crane committed to a state facility for residential care and treatment. *Id.* at 25a. Crane appealed to the Kansas Supreme Court, which reversed the trial court on the ground that the State is constitutionally required to prove that Crane "cannot control" his criminal sexual behavior, and that the jury was not properly instructed on that issue in this case. *Id.* at 2a-20a.

2. *The Trial Court Proceedings.* Shortly after Crane's release from prison upon serving the sentence for his underlying offense, the State filed a petition seeking to have him adjudicated as a sexually violent predator. *See* Kan. Stat. Ann. §§ 59-29a03, 59-29a04 (set forth in the appendix to this brief ("Br. App.")), at 3a-5a. After a probable cause hearing, *see* Kan. Stat. Ann. § 59-29a05, Br. App. 6a, the trial court directed that Crane be sent to the Larned State Security

Hospital (a secure, mental health facility) to be evaluated by state mental health professionals, a procedure that is a feature of the Act. *See* Kan. Stat. Ann. § 59-29a05(d), Br. App. 6a.

a. *Crane's Evaluation.* Crane's evaluation was conducted by Dr. Leonardo B. Mabugat, a psychiatrist/M.D., and Mr. Kenneth Eaves, a licensed master's level psychologist. Their written evaluation, reprinted in full in the Joint Appendix ("J.A.") at 11-20, began with a discussion of the circumstances that led to Mr. Crane's most recent conviction, including his exposure of himself to a tanning salon attendant and his physical attack upon a video store clerk, when he forcibly "carried the victim to the back of the store, told her to engage in fellatio, and threatened to rape her." J.A. 12. The evaluation then detailed 18 other arrests, charges or convictions involving Crane and dating back to 1979, many of which were sexual in nature. J.A. 12-16. These included convictions for trespass, burglary, resisting police, felony theft, and sexual abuse in the first degree, as well as arrest or charges for indecent exposure (several times), sexual assault, felony attempted forcible rape, felony sexual abuse, and abuse of a child. J.A. 13-16. As the report notes, however, "Mr. Crane's aggression toward women appears not always to have been adjudicated as fact." J.A. 16.

The evaluation report further notes that, while in prison, Crane "completed thirty hours of group therapy" but that "he excluded discussions of his sexual and criminal behavior" and "has never participated in sex offender treatment." J.A. 17. The mental health professionals observed that Crane's "responses are logical and organized" and that he "is not preoccupied with delusions. Hallucinatory behavior is not evident. He is able to verbalize some insight into his behavior; however, he seems to minimize the seriousness of this illegal behavior." J.A. 18.

The evaluators' conclusion was that Crane meets the criteria under Diagnostic And Statistical Manual Of Mental

Disorders (4th ed. 1994) (American Psychiatric Association) ("DSM-IV") for "Exhibitionism and Antisocial Personality Disorder." J.A. 19. They continued that "[i]t is the opinion of the evaluating staff that Mr. Crane possesses a mental abnormality, Antisocial Personality Disorder, which would account for his aggression toward women. * * * This aggression has been sexual in that it has proceeded progressively from his exhibitionist behavior." J.A. 19-20. Thus, they concluded that if the sexual offenses listed earlier in the report (some of which involved only arrests or charges, not necessarily convictions) "are true, Mr. Crane is then considered to be a sexually violent predator." J.A. 20.

b. *The Constitutional Issue.* Crane repeatedly argued to the trial court that he could not be committed constitutionally absent a showing that he was totally unable to control his criminal sexual behavior. *See, e.g.,* Pet. App. 22a-23a. The trial court rejected his constitutional claim as follows:

> The Court finds the commission of a sexual crime and the existence of a mental abnormality or personality disorder which makes the person likely to engage in future predatory acts of violence are separate concepts and not interdependent upon one another in the sexually violent predator context. The Court denies Respondent's Motion for Summary Judgment stating as a matter of law that Respondent misinterprets the holding of *Kansas v. Hendricks*, by arguing the State must prove the existence of a mental disorder that so impairs the volitional control of Respondent as to render him unable to control his dangerous behavior. The Court holds the State must only prove the existence of a mental disorder that makes Respondent likely to reoffend.

Id. 23a (internal citations omitted).

c. *The Evidence At Trial.* The case then proceeded to trial. At trial, "the State presented evidence of Crane's

inappropriate sexual behavior on several occasions as well as the testimony of mental health professionals." Pet. App. 3a. In particular, the State presented four mental health witnesses, a psychiatrist (M.D.), two licensed master's level psychologists (LMLPs), and one doctorate level psychologist (Ph.D.). Crane presented no mental health witnesses.

The first mental health professional to testify, Robert Huerter (a LMLP), evaluated Crane in 1993 when Crane was charged with his most recent sexual offenses. J.A. 27-28. In particular, Huerter evaluated whether Crane might have suffered a "blackout" during the commission of the offenses. Huerter concluded that Crane did not, and that indeed he was aware of and understood what he was doing to the victim. J.A. 29-32.

The second mental health professional to testify was Leonardo Mabugat, a state psychiatrist. On direct examination, Dr. Mabugat testified that, although he had performed approximately ten predator evaluations by the time of the trial in this case, he had concluded that only Crane satisfied the Kansas statute's requirements for finding someone to be a sexually violent predator. J.A. 42-44. Dr. Mabugat further testified that Crane suffers from both Antisocial Personality Disorder and Exhibitionism, recognized mental disorders under the DSM-IV, at 525-26, 645-50. J.A. 44-51. Dr. Mabugat also testified that Crane is likely to reoffend if not treated in a secure facility. J.A. 50. Lastly, in response to a question whether Crane "can't control his behavior, or won't control his behavior," Dr. Mabugat responded that "it's a combination thereof." J.A. 51.

On redirect examination, Dr. Mabugat testified that both Antisocial Personality Disorder and Exhibitionism qualified as a "mental abnormality" under the Kansas statute, and that a person need not be psychotic or delusional when he commits a sexual offense to qualify as a sexually violent predator under the Kansas law. J.A. 71-72.

The third mental health professional to testify was Kenneth Eaves, a LMLP. He testified that he shared Dr. Mabugat's opinions that Crane suffers from Antisocial Personality Disorder and Exhibitionism, and that Crane is likely to reoffend if not kept in a secure facility for treatment. J.A. 89, 92. Mr. Eaves indicated that he initially had doubts that Crane qualified as a sexually violent predator under the Kansas law, but that he became convinced of Dr. Mabugat's diagnosis upon learning the full scope and extent of Crane's prior criminal history. J.A. 89-92.

The final mental health witness was Douglas Hippe, a licensed psychologist (Ph.D.). Dr. Hippe testified that he, like Mr. Huerter, had evaluated Crane in 1994 to ascertain whether Crane may have suffered from a blackout or other mental condition at the time he committed his most recent sexual offenses. J.A. 105-106. Dr. Hippe further testified that he had updated himself on Crane's status since then by reviewing Crane's most recent psychological records. J.A. 106-108. Dr. Hippe indicated that his diagnosis of Crane remained essentially the same from 1994 to 1998, J.A. 109, and that his conclusion was that Crane suffers from both Antisocial Personality Disorder, J.A. 110-116, and Exhibitionism. J.A. 116.

Dr. Hippe also testified that, although a diagnosis of Exhibitionism standing alone would not justify commitment as a sexually violent predator, J.A. 117, Crane satisfied the statutory requirements because his criminal sexual behavior was "of increasing frequency and particularly increasing intensity," showing "more of a disregard for the rights of others." J.A. 118. Dr. Hippe indicated that Crane's behavior was unlikely to improve without intensive, residential therapy, J.A. 118-120, and that he "would hesitate significantly to look at any kind of outpatient treatment" for Crane, as opposed to treating him in a secure facility. J.A. 120. Dr. Hippe testified that Crane is a "violent" offender and that he is very likely to

reoffend if not treated intensively in a secure setting. J.A. 121-122.

As the Kansas Supreme Court acknowledged, the State's mental health witnesses—including a psychiatrist and three psychologists—testified that Crane suffers from antisocial personality disorder and exhibitionism, with increasing frequency and intensity of his violent, criminal sexual behavior. Pet. App. 3a. Indeed, there is no dispute that the State presented substantial, largely uncontroverted evidence that (1) Crane suffers from both a mental disorder (Exhibitionism) and a personality disorder (Antisocial Personality Disorder) and (2) he is likely to reoffend if he does not undergo intensive, residential treatment in a secure setting.

d. *The Charge To The Jury.* In the jury instruction conference, Crane renewed his argument that the Constitution requires the State to prove that he is unable to control his criminal sexual behavior. J.A. 138-139. After a discussion with the attorneys on this question, *id.* at 139-141, the trial judge again ruled that the State need only prove that Crane is likely to reoffend, not an utter lack of volitional control. *Id.* at 142-143.

After closing arguments, the trial court then instructed the jury in part that, in order to establish that Crane is a sexually violent predator, the State must prove (*inter alia*) "[t]hat the respondent suffers from a mental abnormality or personality disorder which makes the respondent likely to engage in future predatory acts of sexual violence, if not confined in a secure facility." J.A. 156 (Instr. No. 7). The court further instructed the jury that "'Mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes a person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." *Id.* (Instr. No. 9). Also, the jury was instructed that "'Personality disorder' means a condition recognized by the American Psychiatric Association

Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) [DSM-IV], and includes antisocial personality disorder." J.A. 157 (Instr. No. 9).

The jury then deliberated and responded "Yes" to the following special verdict question: "Is the respondent, MICHAEL T. CRANE, a sexually violent predator?" J.A. 158.

3. *The Kansas Supreme Court.* The Kansas Supreme Court began its discussion of the merits by stating that

> [T]he controlling issue is whether it is constitutionally permissible to commit Crane as a sexual predator absent a showing that he was unable to control his dangerous behavior. To answer that question, we must revisit *Kansas v. Hendricks*, 521 U.S. 346 (1997).

Pet. App. 5a. The court then opined that "[t]he majority opinion, written by Justice Thomas, controls the result in this case." *Id.*

Looking at the majority opinion in *Hendricks*, the Kansas Supreme Court declared that Justice Thomas's opinion "is replete with references to the commitment of persons who cannot control their own behavior." Pet. App. 6a. The Kansas court quoted extensively from *Hendricks*, highlighting references to mental disorders that make it "'difficult, if not impossible, for the person to control his dangerous behavior'", "'criteria relating to an individual's inability to control his dangerousness'", and "'admitted lack of volitional control.'" *Id.* at 7a-8a (quoting *Hendricks*, 521 U.S. at 358, 360).

The Kansas Supreme Court then turned to the Kansas Act. The court observed that the Kansas law "does not expressly prohibit confinement absent a finding of uncontrollable dangerousness. In fact, a fair reading of the statute gives the opposite impression." Pet. App. 8a. Noting that the Kansas Act permits commitment when a sex offender's mental

abnormality affects "either emotional capacity or volitional capacity," *id.* at 9a, the Court concluded that "the result of the legislature's identifying emotional capacity as well as volitional capacity in the definition of mental abnormality was to include a source of bad behavior other than inability to control behavior." *Id.* The Court further noted that nothing in the Kansas law suggests a requirement that the State prove inability to control behavior when the person's diagnosis is for personality disorder rather than mental abnormality. *Id.*

Thus, concluding that state law does not require proof of inability to control behavior in this context, the Kansas court turned to Crane's constitutional argument and this Court's decision in *Hendricks*. First, the Kansas court opined that

> "[*i*]*n contrast to this court's* [the Kansas Supreme Court's] *focus on the Act's constitutionality, the Supreme Court's opinion* [in *Hendricks*] *seems to be much more specific to application of the Act to Hendricks.* The particular facts of Hendricks' case, including his conceding that he cannot control his urge to sexually molest children, was at the core of the Supreme Court's opinion.

Pet. App. 10a (emphasis added). Second, the Kansas Supreme Court asserted that

> A fair reading of the majority opinion in *Hendricks* leads us to the inescapable conclusion that commitment under the Act is unconstitutional absent a finding that the defendant cannot control his dangerous behavior. To conclude otherwise would require that we ignore the plain language of the majority opinion in *Hendricks*.

Pet. App. 11a. The Kansas court once again pointed to language in Justice Thomas's opinion, specifically references to those "'who suffer from a volitional impairment rendering them dangerous beyond their control'", and a mental abnormality or personality disorder that "'makes it difficult, if

not impossible,' to control such behavior." *Id.* (quoting *Hendricks*, 521 U.S. at 358).

The Kansas court opined that, "[h]owever, in the present case, Crane suffers from a 'personality disorder,' which by definition does not include a volitional impairment." Pet. App. 11a-12a. Thus, the Court reversed the commitment order because the jury was not instructed that it had to find Crane had an "inability to control his behavior." *Id.* at 12a.

SUMMARY OF THE ARGUMENT

In 1997, this Court upheld the Kansas Sexually Violent Predator Act against sweeping substantive due process, double jeopardy and *ex post facto* challenges. *See Kansas v. Hendricks*, 521 U.S. 346 (1997); *see also Seling v. Young*, 531 U.S. 250 (2001). Importantly, the Court expressly held that the Act's premises for involuntary civil commitment of certain sex offenders—proof of (1) a "mental abnormality" *or personality disorder* and (2) dangerousness linked to such a mental problem—satisfied constitutional substantive due process requirements. *Id.* at 356-60. Nowhere in any of the *Hendricks* opinions did any member of the Court purport to favor a new rule of substantive due process that requires the State to prove—as a prerequisite to involuntary civil commitment—that a sexually violent predator "cannot control" his criminal sexual behavior. Nor does historical practice support such a requirement. Rather, there is simply no basis in law, medicine, policy or practice for such a constitutional requirement.

In addition to the Kansas Supreme Court's misreading of this Court's decision in *Kansas v. Hendricks*, there are at least two fundamental flaws in the Kansas court's apparent understanding of mental health diagnosis and treatment. First, some personality disorders are characterized, at least in part, by a degree of volitional impairment. Thus, the Kansas Supreme Court's opinion that personality disorders "per se" or

"by definition" do *not* involve volitional impairment is wrong as a matter of medical fact. Second, a "cannot control" standard has no basis in mental health diagnosis and treatment. The overwhelming weight of mental health authority would view virtually any person's behavior as falling along a continuum of volitional control, with even brutal, murderous sex offenders such as Jeffrey Dahmer and Ted Bundy exercising considerable volitional control over their heinous actions. Pursuant to the Kansas Supreme Court's nonsensical "cannot control" standard, even those two offenders could not have been involuntarily committed.

The Kansas Supreme Court's holding in this case, if not rejected, threatens to eliminate from the States' reach any sex offender—regardless of past history and likelihood of reoffending—whose primary or sole diagnosis involves impaired *emotional* rather than volitional capacity. The Kansas court's "cannot control" standard also will eliminate from residential treatment programs any offenders whose diagnoses involve only *partial* volitional impairment. Ironically, such offenders (like Michael Crane in this case) may be the ones most likely to succeed under intensive, residential care and treatment that teaches them to change and *control* their behavior.

ARGUMENT

I. THE COURT IN *KANSAS v. HENDRICKS* DID NOT CREATE A NEW "CANNOT CONTROL" REQUIREMENT IN THE CIVIL COMMITMENT CONTEXT, NOR IS A NEW DUE PROCESS STANDARD WARRANTED.

A. The Court Has Appropriately Taken A Deferential Approach To Substantive Due Process Claims In The Mental Health Context.

The Court could not have been more clear in *Kansas v. Hendricks*, 521 U.S. 346 (1997), when it declared that

> [W]e have never required State legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance. As a consequence, the States have, over the years, developed numerous specialized terms to define mental health concepts. Often, those definitions do not fit precisely with the definitions employed by the medical community. * * * Legal definitions, however, . . . need not mirror those advanced by the medical profession.

521 U.S. at 359 (internal citations omitted). Moreover, the Court reiterated that differences of opinion among mental health professionals "do not tie the State's hands in setting the bounds of its civil commitment laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes." *Id.* at 360 n.3.

The dissenting Justices in *Hendricks* also endorsed these fundamental principles. Discussing the significance of differences of medical opinion, Justice Breyer observed that

> [T]he very presence and vigor of this debate is important. The Constitution permits a State to follow one reasonable professional view, while rejecting another. The psychiatric debate, therefore, helps to inform the law by setting the bounds of what is reasonable, but it cannot here decide just how States must write their laws within those bounds.

521 U.S. at 375 (Breyer, J., dissenting) (internal citations omitted).

Thus, the familiar starting point for the Court's analysis is that statutes properly enacted by state legislatures are presumed constitutional, *Heller v. Doe*, 509 U.S. 312, 319 (1993), unless they involve either fundamental rights or

suspect classes. *Id. See also City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). "So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.'" *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952), and *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)). Importantly, in its substantive due process analysis, this Court traditionally pays "particular deference to reasonable legislative judgments," *Jones v. United States*, 463 U.S. 354, 365 n.13 (1983); *see also Marshall v. United States*, 414 U.S. 417, 427 (1974), especially when expert opinions differ on important medical or scientific issues, such as what constitutes "mental illness" or an identifiable mental disorder. *Kansas v. Hendricks*, 521 U.S. 346 (1997).

The Court traditionally has left the *substantive* aspects of state civil commitment statutes—as opposed to *procedural* requirements—to the States, with little federal constitutional limitation. "[T]his Court has *never* applied strict scrutiny to the substance of state laws involving involuntary confinement of the mentally ill." *Foucha v. Louisiana*, 504 U.S. 71, 119 (Thomas, J., dissenting). The question presented in this case involves only a substantive, and not a procedural, due process challenge to the Kansas statute. This is not surprising, given that the Kansas statute contains extensive procedural safeguards, including but not limited to the provision of counsel, the assistance of expert mental health professionals (at state expense, if necessary), the right to a jury trial and a requirement that the State prove its case beyond a reasonable doubt. *See* Kan. Stat. Ann. §§ 59-29a05(c)(1) (counsel), 59-29a06 (counsel, mental health expert, jury trial), 59-29a07 (proof beyond a reasonable doubt), Br. App. 6a-10a.

In cases involving substantive due process challenges to civil commitment systems, this Court has never gone further

than to require that the State prove that a person subject to commitment is both (1) "mentally ill" and (2) "dangerous." *See, e.g., Kansas v. Hendricks*, 521 U.S. 346 (1997); *Seling v. Young*, 531 U.S. 250 (2001); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Addington v. Texas*, 441 U.S. 418 (1979); *Humphrey v. Cady*, 405 U.S. 504 (1972). Nor has the Court constitutionalized any particular definition of either "mental illness" or "dangerousness" as prerequisites to the invocation of state civil commitment proceedings.

Thus, the choices a state makes in this regard are classic legislative judgments that the Court historically has reviewed only for *reasonableness*. *See, e.g.*, *Hendricks*, 521 U.S. 346; *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("the nature and duration of commitment [must] bear some *reasonable relation* to the purpose for which the individual is committed") (emphasis added); *see also O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Addington v. Texas*, 441 U.S. 418 (1979).[1] *Hendricks* confirms that substantive due process notions only require that State legislatures choose between reasonable options supported by the legitimate judgments of mental health

[1] Indeed, in *Youngberg v. Romeo*, 457 U.S. 307 (1982), in addressing an involuntary civil committee's claim that he had due process rights to safe conditions and freedom from bodily restraint, the Court observed that liberty interests "are not absolute." *Id.* at 319-20. The Court declared that, "[i]n determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance 'the liberty of the individual' and 'the demands of an organized society.'" *Id.* at 320 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)). The Court then articulated a test, holding that "'the Constitution only requires that the courts make certain that professional judgment [of mental health professionals] in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.'" *Id.* at 321 (quoting *Romeo v. Youngberg*, 644 F.2d 147, 178 (3d Cir. 1980) (en banc) (Seitz, C.J., concurring)). The Court has also observed that "[w]e have applied rational-basis review in previous cases involving the mentally retarded and the mentally ill." *Heller v. Doe*, 509 U.S. 312, 321 (1993).

professionals, especially when there may not be consensus on particular medical or scientific questions.[2]

> The Court has long recognized that
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> The States have traditionally exercised broad power to commit persons found to be mentally ill. The substantive limitations on the exercise of this power and the procedures for invoking it vary drastically among the States. The particular fashion in which the power is exercised—for instance, through various forms of civil commitment, defective delinquency laws, sexual psychopath laws, commitment of persons acquitted by reason of insanity—reflects different combinations of distinct bases for commitment sought to be vindicated.

Jackson v. Indiana, 406 U.S. 715, 736-37 (1972) (footnotes omitted). Particularly when a state legislature "undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation." *Marshall v. United States*, 414 U.S. 417, 427 (1974).

In addressing the substantive due process requirement of dangerousness—which is really the requirement at issue in this case—this Court has rejected the argument that legislative choices necessarily must be justified by empirical, scientific or medical evidence, rather than ordinary reasonableness:

> We do not agree with the suggestion that . . . power to legislate in this area depends on the research conducted by the psychiatric community. * * * The lesson we have drawn is not that government may not act in the face of

[2] The Court has recognized that psychiatry is not "an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness." *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985).

> this uncertainty, but rather that courts should pay particular deference to *reasonable* legislative judgments.

Jones v. United States, 463 U.S. 354, 365 n.13 (1983) (emphasis added).[3]

Thus, the Court consistently has taken a deferential approach to evaluating the constitutionality of the *substance* of the States' civil commitment standards. As the Court saw in *Hendricks*, significant differences of expert medical opinion exist with regard to some aspects of the diagnosis and

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[3] The "choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge [of right and wrong] should determine criminal responsibility." *Leland v. Oregon*, 343 U.S. 790, 801 (1952). In rejecting the argument that the Constitution requires States to recognize alcoholism as a defense to a criminal charge of public intoxication, this Court warned that

> We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.
>
> Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. * * * [F]ormulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.

Powell v. Texas, 392 U.S. 514, 535-37 (1968) (Marshall, J.) (plurality opinion) (footnote omitted). *See also Montana v. Egelhoff*, 518 U.S. 37 (1996) (plurality opinion) (holding that due process does not require a State to permit a voluntary intoxication defense to a criminal charge).

treatment of the mental conditions afflicting many sex offenders. These differences of reputable medical opinion, however, do not constitutionally disable Kansas or the States from acting. Rather, the Court's traditional deference to the States' choices in dealing with mental health matters is absolutely proper and only logical as a constitutional matter. That is one of the lessons of the Court's decision in *Kansas v. Hendricks*, which expressly upheld the Kansas statute's reliance on the concepts of "mental abnormality or personality disorder."

Otherwise, the only realistic option is for this Court to impose a single civil commitment system on all of the States as a matter of federal constitutional law, something the Court long has declined to do, and with good reason. So long as there is a legitimate scientific and medical basis for the substantive requirements of a state's civil commitment scheme, substantive due process requirements are satisfied.

B. *Hendricks* Did Not Create A New Substantive Due Process Requirement For Civil Commitment.

1. The *Hendricks* Opinions Did Not Adopt A New Lack Of Volitional Control Requirement.

The Court's precedents in the civil commitment context—including its decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997)—uniformly recognize only two substantive due process requirements. First, there must be proof that the person is dangerous to himself or others. Second, that dangerousness must be linked to a significant mental problem.[4]

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[4] *Addington v. Texas*, 441 U.S. 418 (1979), held that to commit an individual to a mental institution in a civil proceeding the State is required by the Due Process Clause to prove by clear and convincing evidence the two statutory preconditions to commitment: that the person sought to be committed is mentally ill and that he requires hospitalization for his own welfare and protection of others.

In *Hendricks*, eight Justices[5] agreed that the Kansas Sexually Violent Predator Act satisfies those two requirements. The division of opinion in *Hendricks* was over Hendricks' *ex post facto* challenge, not his substantive due process claims.

Indeed, in his concurring opinion, Justice Kennedy observed that "[a]s all members of the Court seem to agree, then, the power of the state to confine persons who, by reason of mental disease or mental abnormality, constitute a real, continuing, and serious danger to society is well established." 521 U.S. at 372. Justice Breyer, who dissented on the *ex post facto* question, nonetheless concluded that the Kansas Act satisfied substantive due process principles. *See* 521 U.S. at 373 (Breyer, J., dissenting) ("I agree with the majority that the Kansas Act's definition of 'mental abnormality' satisfies the 'substantive' requirements of the Due Process Clause.").

Thus, in *Hendricks*, no Justice purported to hold that lack of volitional control is a federal constitutional requirement. There are indeed passing references in the majority opinion to a person's "inability to control" behavior, or "lack of adequate control," 521 U.S. at 357, 358, 362, 364, and in the dissent to "irresistible impulse." *Id.* at 375-76. It was, of course, not surprising that the Court mentioned lack of volitional control in *Hendricks*, since Mr. Hendricks had a primary diagnosis of pedophilia, a 40-year history of molesting children of all ages, and testified that he could not control his deviant impulses. But nothing in any of the opinions states, declares or holds that the Court was adopting a previously unknown substantive due process requirement regarding volitional control.

The Court has frequently emphasized historical practice in determining substantive due process limits on involuntary

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Foucha v. *Louisiana*, 504 U.S. 71, 75-76 (1992).

[5] Justice Ginsburg does not appear to have joined any opinion on the substantive due process issues. *See* 521 U.S. at 373.

restraint. The Kansas Supreme Court did not rely on history for the new "cannot control" rule, nor could it have done so. Rather, historical practice refutes any such requirement.

Although perceived lack of volitional control has certainly been *one* basis for civil commitment, it has by no means ever been the *only* basis.[6] Indeed, sources regarding eighteenth and nineteenth century practices and laws uniformly indicate that the States enjoyed wide latitude in determining the bases for civil commitment.[7]

Moreover, well-established practices such as quarantine,[8] for example, could not be justified on the ground that persons

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[6] *See, e.g.*, W. Blackstone, Vol. 1, *Commentaries on the Law of England* *304 (1765) (involuntary commitment justified for "lunatics," "persons under frenzies," those "who lose their intellects by disease," and those "judged by the court of chancery incapable of conducting their own affairs"); A. Deutsch, *The Mentally Ill in America* 418-422 (1937) (discussing the variety of common law bases for involuntary commitment in the last quarter of the eighteenth century and first half of the nineteenth century); *id.* at 422 (discussing the case of Josiah Oakes in 1845 in which "Chief Justice Shaw ruled that restraint of the insane was justified not only by regard for public or personal safety, but by considerations of remedial treatment"); G. Grob, *Mental Institutions in America: Social Policy to 1875* 9 (1973) (variety of bases in colonial times).

[7] *See, e.g.*, G. Grob, *Mental Institutions in America: Social Policy to 1875*, at 3, 132 (1973) (indicating that mental hospitals in the nineteenth century cared for a variety of individuals, including those "whose behavior was deemed socially disruptive by the community," "abnormal," or who "because of behavioral problems [were] deemed dangerous to the security either of the family or of society"); A. Deutsch, *The Mentally Ill in America* 418-422 (1937) (discussing the variety of common law bases for involuntary commitment in the last quarter of the eighteenth century and first half of the nineteenth century).

[8] T. Cooley, *A Treatise On The Constitutional Limitations Which Rest Upon The Legislative Power Of The States Of The American Union* 584 (1868) ("quarantine regulations and health laws" are an inherent part of the "police power of the States").

being quarantined for contagious diseases generally lack the ability to control their behavior. Yet the Court has expressly declared that involuntary quarantine for contagious diseases does not violate due process. *Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. Of Health*, 186 U.S. 380 (1902) (permitting involuntary quarantine of persons suffering from communicable diseases); *Jacobson v. Massachusetts*, 197 U.S. 11, 26, 29 (1905) (holding that mandatory vaccinations do not violate due process, and noting that quarantine does not either); *O'Connor v. Donaldson*, 422 U.S. 563, 582-83 (1975) (Burger, C.J., concurring) ("There can be little doubt that in the exercise of its police powers a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease.").

2. Personality Disorders Can Justify Civil Commitment.

To the extent the Kansas Supreme Court held that a personality disorder, "by definition", can never satisfy substantive due process requirements, Pet. App. 11a-12a, that court was simply wrong. The American Psychiatric Association recognizes that "no definition adequately specifies precise boundaries for the concept of 'mental disorder.' The concept of mental disorder, like many other concepts in medicine and science, lacks a consistent operational definition that covers all situations." DSM-IV, at xxi.[9]

Indeed, the psychiatrists caution that there may be an "imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis."

[9] DSM-IV defines "mental disorder" as "a clinically significant behavorial or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (*e.g.*, a painful symptom) or disability (*i.e.*, impairment in one or more important areas of functioning) or with a significantly increased risk of suffering, death, pain, disability or an important loss of freedom." DSM-IV, at xxi.

DSM-IV, at xxiii. To be sure, a "mental disorder" or "personality disorder" diagnosis does not alone necessarily

> imply that the condition meets legal or other nonmedical criteria for what constitutes mental disease, mental disorder, or mental disability. The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination, and competency.

Id. at xxvii. But that is why the Court in *Hendricks* reiterated that substantive due process requires that there be a finding of dangerousness linked to the person's mental problems.

Some personality disorders clearly justify involuntary civil commitment for residential care and treatment under this Court's decision in *Hendricks*. Indeed, the American Psychiatric Association states that "[a] Personality Disorder is an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress *or impairment*." DSM-IV, at 629 (emphasis added). Recognized personality disorders include Paranoid Personality Disorder, Schizoid Personality Disorder, Schizotypal Personality Disorder, Antisocial Personality Disorder (Crane's diagnosis in this case), Borderline Personality Disorder, Histrionic Personality Disorder, Narcissistic Personality Disorder, Avoidant Personality Disorder, Dependent Personality Disorder, Obsessive-Compulsive Personality Disorder, and Personality Disorder Not Otherwise Specified. *Id.*

Several personality disorders are characterized by impulsiveness, including Antisocial Personality Disorder, and thus volitional impairment, although that impairment may not

preclude such offenders from exercising *any and all* control over their criminal sexual behavior. *See* DSM-IV, at 629-73. Thus, the Kansas Supreme Court's holding in this case may preclude the commitment of some dangerous sex offenders with serious, diagnosed personality disorders, whose behavior might well be improved by intensive therapy that would teach them to *control* their deviant, sexual impulses.

For example, one of the diagnoses for Crane in this case—Antisocial Personality Disorder—has an "essential feature" of "a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood." DSM-IV, at 645. Moreover, DSM-IV's extensive description of this disorder indicates that such a diagnosis is very serious and often applies to a person who poses substantial risks of engaging in criminal acts that will harm others. For example, persons with this diagnosis "fail to conform to social norms with respect to lawful behavior," "may repeatedly perform acts that are grounds for arrest," "disregard the wishes, rights, or feelings of others," "are frequently deceitful and manipulative," "may repeatedly lie," "tend to be irritable and aggressive," and "may blame the victims for being foolish, helpless, or deserving their fate," among other endearing traits. *Id.* at 646.

Nor is Antisocial Personality Disorder a common diagnosis among the American population. DSM-IV indicates that the prevalence of Antisocial Personality Disorder "is about 3% in males and about 1% in females." DSM-IV, at 648.

This Court's decision in *Kansas v. Hendricks* established that proof of dangerousness (of which there is no question in this case) linked to a serious mental problem (such as Crane's diagnoses of Antisocial Personality Disorder and

Exhibitionism[10]) satisfies constitutional requirements in this context. The Kansas Supreme Court simply misread this Court's decision. Notably, in *Hendricks* this Court reversed the Kansas Supreme Court's earlier decision invalidating the Kansas law on substantive due process grounds similar to those upon which the Kansas court has once again seized in this case.

A fair reading of *Kansas v. Hendricks* demonstrates that this Court did not create a new substantive due process "cannot control" requirement. At most, the Court's references to lack of volitional control reflect the facts and circumstances of the case that was before the Court. Not a single Justice indicated that "inability to control" or proof of "irresistible impulse" was a substantive due process requirement, nor should they be.

Most lower state courts have correctly concluded that *Hendricks* did not create a new rule of substantive due process in the civil commitment context. Instead, they correctly read *Hendricks* as requiring only proof of (1) dangerousness, *i.e.*, a likelihood of reoffending, linked to (2) a serious mental problem. For example, in *In re Gordon*, 10 P.3d 500, 503 (Wash. App. Ct. 2000), the Court observed that "[l]ike the

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[10] "Exhibitionism" (a paraphilia) is characterized by "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving the exposure of one's genitals to an unsuspecting stranger" that "cause clinically significant distress or impairment in social, occupational, or other important areas of functioning." DSM-IV, at 526.

In discussing rape, a leading treatise on sex offenders states that the "cycle of ongoing urges, attempts to control them, breakdown of those attempts, and recurrence of the sex crime is similar to the clinical picture presented by exhibitionists, voyeurs, pedophiles, and other traditionally recognized categories of paraphiliacs." Gene G. Abel & Joanne L. Rouleau, *The Nature and Extent of Sexual Assault, in Handbook of Sexual Assault: Issues, Theories and Treatment of the Offender* 18 (W.L. Marshall *et al.* eds., 1990).

Kansas statute," Washington's statute "requires the State to prove . . . that a causal link exists between an alleged sexual predator's mental abnormality or personality disorder and the likelihood that he or she will engage in predatory acts of sexual violence in the future." *Id.* at 503. Thus, the Court concluded that the Washington law

> therefore meets the *Hendricks* Court's requirement that civil commitment not be predicated on dangerousness alone. Contrary to Gordon's assertion, *Hendricks* does not require a jury to make a specific finding that the mental abnormality or personality disorder makes it impossible, or at least difficult, for an individual to control his dangerous behavior.

Id. Similarly, in *In re Varner*, 315 Ill. App. 3d 626, 637-38, 734 N.E.2d 226, 235-36 (2000), the court rejected arguments that substantive due process requires the State to prove either that a sex offender "lacks volitional control over his sexual behavior" or that "it was difficult if not impossible for the [offender] to keep himself from offending again."

In *People v. Hatfield*, 68 Cal. App. 4th 594, 80 Cal. Rptr. 268, 282 (1998), *review denied and opinion ordered not published* (Mar. 17, 1999), the California Court of Appeals declared that

> The essence of the due process requirement announced in *Hendricks* is a demonstrated, diagnosed impairment that makes the person likely to engage in dangerous sexually violent behavior in the future. It is the prediction of future dangerousness, whether due to inability to control behavior or a compelled choice so to act, that justifies civil commitment.

80 Cal. Rptr. at 282.

This Court should clarify that substantive due process does not impose a "cannot control" requirement.

C. A "Cannot Control" Requirement Has No Basis In The Diagnosis And Treatment Of Mental Problems.

There is simply no basis in medical or scientific fact for the Kansas Supreme Court's conclusion that the State must prove that a mentally disturbed sex offender "cannot control" his criminal sexual behavior in order to commit him. Virtually no one has complete and total lack of volitional control, even those who suffer from schizophrenia or serious psychoses. *See, e.g.*, Brief For The Association For The Treatment Of Sexual Abusers As *Amicus Curiae* In Support of Petitioner, in *Kansas v. Crane*, No. 00-957, at 3 (hereinafter "ATSA Brief") (quoting Christopher Slobogin, *An End To Insanity: Recasting The Role Of Mental Disability In Criminal Cases*, 86 Va. L. Rev. 1199, 1238 (2000) ("[A]s Morse and others have shown, even the most severely crazy people usually intend their acts and therefore have some control of them.").

Rather, the reason those opposed to sex offender civil commitment laws push for a "cannot control" standard is that virtually all diagnoses in the DSM-IV would fail to satisfy such a test, effectively eviscerating the laws.

Volitional impairment is a feature of many mental problems and disorders, but even some of the most troubled people are rational and calculating, at least some of the time, if not much of the time. Indeed, some of our country's most heinous sex offenders—people such as Jeffrey Dahmer and Ted Bundy—certainly did not have complete "inability to control" their murderous behavior. Rather, they were quite cunning and calculating, and both of them managed to avoid detection and prosecution for some time. Thus, held to the Kansas Supreme Court's "cannot control" standard, it is likely that a state could not prove that even offenders such as those two should be subject to involuntary civil commitment for residential care and treatment.

The medical and scientific reality, however, is that for virtually all people volitional control is a matter of degree that is impossible to measure or to establish. *See, e.g.,* ATSA Brief, at 2-6; Stephen J. Morse, *Crazy Reasons*, 10 J. Contemp. Legal Issues 189, 218 (1999). That uncontrovertible fact counsels in favor of constitutional standards that permit the States to exercise reasonable legislative judgment, not a federal requirement that is an impossible and unworkable standard.

It seems very unlikely that any reputable mental health professional would be willing to testify that anyone—including someone like Dahmer or Bundy—has an "utter" or "total" inability to, *i.e.,* "cannot", control their criminal sexual behavior. *See, e.g.,* ATSA Brief, at 2-6. Moreover, in discrediting the "irresistible impulse" theory of "insanity" in the criminal context, the American Psychiatric Association long has taken the position that the "'line between an irresistible impulse and an impulse not resisted' is indeterminate in practice and profoundly problematic in theory." Brief for the American Psychiatric Association in *Kansas v. Hendricks*, Nos. 95-1649, 95-9075, at 25 n.22 (quoting *APA Statement on the Insanity Defense*, 140 Amer. J. Psychiatry 681, 685 (1983)).[11] Rather, those suffering from mental disorders generally have neither an "utter" or "total" lack of control over their criminal behavior, nor do they perhaps have complete control. In other words, their disorders probably do affect their volitional and emotional capacity, but only to some greater or lesser *degree* which it is impossible to measure.

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[11] Defining the concept of "insanity"—both for legal and medical purposes—has long bedeviled both the lawyers and the mental health professionals. *See, e.g.,* A. Deutsch, *The Mentally Ill In America*, at 386 (1st ed. 1937) ("Indiscriminately used in both a medical and a legal sense, the word *insanity* lacks scientific sanction or precise meaning in either.") (emphasis original).

The Kansas Supreme Court's "cannot control" standard is simply unrealistic—even nonsensical—as a medical, scientific, and practical matter, even apart from the lack of any legal basis for such a standard in this Court's substantive due process precedents.

II. IF THE COURT CHOOSES TO CREATE A NEW SUBSTANTIVE DUE PROCESS STANDARD, IT SHOULD NOT REQUIRE MORE THAN PROOF OF "SOME" VOLITIONAL IMPAIRMENT.

Even those lower state courts that have created a new substantive due process requirement that the State make some showing regarding a sex offender's volitional impairment have generally required something less than "total" or "complete" lack of control. For instance, in *In re Linehan*, 594 N.W.2d 867, 875-76 (Minn. 1999), *cert. denied sub nom. Linehan v. Minnesota*, 528 U.S. 1049 (1999), a majority of the Minnesota Supreme Court rejected a "total" lack of control standard, and instead adopted a lack of "adequate" control requirement. The majority chastised the dissent for attempting to

> unreasonably narrow the *Hendricks* holding by inserting the word 'totally' in front of the word 'control' whenever it refers to the Supreme Court's analysis of a person's ability to control his or her sexual impulses. In doing so, the dissent overstates the *Hendricks* holding. *Hendricks* states that a person may be civilly committed if he suffers from a mental abnormality or personality disorder 'that makes [it] difficult, if not impossible, for the person to control his dangerous behavior.' Clearly this language does not require an utter lack of control over harmful behavior, but rather a lack of adequate control over harmful behavior.

Id. at 873 n.3.

To similar effect, see *In re Brooks*, 94 Wash. App. 716, 729, 973 P.2d 486, 492 (1999), (The *Hendricks* "Court did not

require, as Mr. Brooks asserts, a showing of a total lack of control. Rather, the person's mental abnormality or personality disorder must make it 'difficult, if not impossible, for the person to control his dangerous behavior'"), *review granted on other issues*, 138 Wash. 2d 1021, 989 P.2d 1136 (1999).

If the Court concludes that it should create an additional, new substantive due process requirement in this context, the standard should at least be a workable one that has some basis in medical and scientific fact. An "utter" or "total" lack of control requirement—*i.e.*, the Kansas Supreme Court's "cannot control" standard—has no such basis. It is uncontrovertible fact that, at least at this time, "'there is no scientific basis for measuring a person's capacity for self-control or for calibrating the impairment of such capacity.'" Brief for the American Psychiatric Association in *Kansas v. Hendricks*, Nos. 95-1649, 95-9075, at 25 n.22 (quoting testimony of Professor Bonnie in S. Rep. 98-225, 98th Cong., 1st Sess. 225-229 (1983)).

A requirement that the State prove "some" volitional impairment, although not justified by current precedent nor by medical or scientific knowledge, would at least offer the States the possibility of committing dangerous sex offenders who suffer from significant personality disorders and who would greatly benefit from intensive, residential care and treatment. As explained above, any stricter requirement has no basis in this Court's precedents nor medical fact, and will be unworkable as a practical matter.

III. VIOLENT, RECIDIVIST SEX OFFENDERS SUCH AS CRANE CAN BENEFIT FROM RESIDENTIAL CARE AND TREATMENT.

Imposing a constitutional requirement that the state must prove a person "cannot control" his criminal, sexual behavior will severely and inappropriately restrict the class of dangerous

sex offenders subject to civil commitment for intensive, residential care and treatment. Many—if not *virtually all*—violent sex offenders have *some* ability to control their deviant sexual behavior; they simply *choose* not to, and in many cases those persons suffer from serious mental problems.

The result of the Kansas Supreme Court's ill-advised holding will be that many dangerous sex offenders who could benefit from intensive, residential therapy—indeed many who might be among those *most likely* to benefit, *see* ATSA Brief, at 7-10—and who pose a significant danger to the public will simply have to be released from state custody without such treatment. Many such offenders refuse to participate in prison treatment programs for various reasons,[12] and more are likely to refuse if there is no possibility that failure to engage in treatment can lead to civil commitment upon completion of their sentences.

Moreover, the treatment needs of sex offenders are often different than of those individuals committed under general civil commitment statutes. Some acutely psychotic conditions are responsive to various antipsychotic drugs, but typical sex

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[12] Another case currently pending before the Court implicates the interaction of incentives to participate in sex offender treatment programs in prison and civil commitment of violent, sex offenders following completion of their sentences. In *McKune v. Lile*, No. 00-1187 (*cert. granted*, May 14, 2001), the Court will consider "whether the revocation of correctional institution privileges violates the Fifth Amendment's privilege against self-incrimination where the inmate has no liberty interest in the lost privileges and such revocation is based upon the inmate's failure to accept responsibility for his crimes as part of a sex offender treatment program?"

Obviously, sex offender inmates who have meaningful incentives to participate in prison treatment programs—whether those incentives are the potential loss of prison privileges or the possibility of civil commitment at the end of the inmates' sentences—are much more likely to participate in such treatment in prison, a result that is in the best interests of both the offenders and the public.

offender conditions such as pedophilia, exhibitionism, and Antisocial Personality Disorder usually are not treated with medication.[13] Instead, recognized sex offender treatment techniques include behavioral reconditioning, relapse prevention, cognitive-behavioral strategies, enhancement of social skills, family systems approaches, and the addictive model. *See generally*

; Barbara K. Schwartz, *Effective Treatment Techniques for Sex Offenders*, 22 Psychiatric Annals 6 (June 1992); ATSA Brief, at 7-10.

None of the state sex offender civil commitment statutes now in existence require—as a statutory matter—proof that dangerous sex offenders with serious mental problems "cannot control" their criminal behavior, and with good reason. Adopting the Kansas Supreme Court's holding in this case will result in the immediate release (without further treatment) of many unquestionably dangerous and mentally disturbed sex offenders upon the general public.

Neither constitutional text, constitutional history, this Court's precedents, medical or scientific fact, legal necessity, practical considerations, public policy nor common sense require that result.

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[13] At this time, there is no consensus regarding drug therapy for violent, recidivist sex offenders. *See, e.g., The Antiandrogen and Hormonal Treatment of Sex Offenders*, in *Handbook of Sexual Assault* 297 (W.L. Marshall *et al.* eds., 1990).

CONCLUSION

For the foregoing reasons, Kansas respectfully requests that the Court reverse the decision of the Kansas Supreme Court, and reiterate that substantive due process principles require proof only of dangerousness linked to a serious mental problem.

Respectfully submitted,

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APPENDIX

KANSAS STATUTES ANNOTATED
CHAPTER 59.—PROBATE CODE
ARTICLE 29a.—COMMITMENT OF SEXUALLY VIOLENT PREDATORS

59-29a01. Commitment of sexually violent predators; legislative findings. The legislature finds that there exists an extremely dangerous group of sexually violent predators who have a mental abnormality or personality disorder and who are likely to engage in repeat acts of sexual violence if not treated for their mental abnormality or personality disorder. Because the existing civil commitment procedures under K.S.A. 59-2901 *et seq.* and amendments thereto are inadequate to address the special needs of sexually violent predators and the risks they present to society, the legislature determines that a separate involuntary civil commitment process for the potentially long-term control, care and treatment of sexually violent predators is necessary. The legislature also determines that because of the nature of the mental abnormalities or personality disorders from which sexually violent predators suffer, and the dangers they present, it is necessary to house involuntarily committed sexually violent predators in an environment separate from persons involuntarily committed under K.S.A. 59-2901 *et seq.* and amendments thereto.

59-29a02. Same; definitions. As used in this act:

(a) "Sexually violent predator" means any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence.

(b) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.

(c) "Likely to engage in repeat acts of sexual violence" means the person's propensity to commit acts of sexual

violence is of such a degree as to pose a menace to the health and safety of others.

(d) "Sexually motivated" means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant's sexual gratification.

(e) "Sexually violent offense" means:

(1) Rape as defined in K.S.A. 21-3502 and amendments thereto;

(2) indecent liberties with a child as defined in K.S.A. 21-3503 and amendments thereto;

(3) aggravated indecent liberties with a child as defined in K.S.A. 21-3504 and amendments thereto;

(4) criminal sodomy as defined in subsection (a)(2) and (a)(3) of K.S.A. 21-3505 and amendments thereto;

(5) aggravated criminal sodomy as defined in K.S.A. 21-3506 and amendments thereto;

(6) indecent solicitation of a child as defined in K.S.A. 21-3510 and amendments thereto;

(7) aggravated indecent solicitation of a child as defined in K.S.A. 21- 3511 and amendments thereto;

(8) sexual exploitation of a child as defined in K.S.A. 21-3516 and amendments thereto;

(9) aggravated sexual battery as defined in K.S.A. 21-3518 and amendments thereto;

(10) aggravated incest as defined in K.S.A. 21-3603 and amendments thereto;

(11) any conviction for a felony offense in effect at any time prior to the effective date of this act, that is comparable to a sexually violent offense as defined in subparagraphs (1) through (11) or any federal or other state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this section;

(12) an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 and 21-3303, and amendments thereto, of a sexually violent offense as defined in this subsection; or

(13) any act which either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this act, has been determined beyond a reasonable doubt to have been sexually motivated.

(f) "Agency with jurisdiction" means that agency which releases upon lawful order or authority a person serving a sentence or term of confinement and includes the department of corrections, the department of social and rehabilitation services and the Kansas parole board.

(g) "Person" means an individual who is a potential or actual subject of proceedings under this act.

(h) "Treatment staff" means the persons, agencies or firms employed by or contracted with the secretary to provide treatment, supervision or other services at the sexually violent predator facility.

(i) "Transitional release" means any halfway house, work release or other placement designed to assist the person's adjustment and reintegration into the community once released from commitment.

(j) "Secretary" means the secretary of the department of social and rehabilitation services.

59-29a03. Same; notice of release of sexually violent predator by agency with jurisdiction to attorney general and multidisciplinary team, time, content; immunity from liability; establishing a multidisciplinary team; appointment of a prosecutor's review committee; assessment of person; provisions of section are not jurisdictional. (a) When it appears that a person may meet the criteria of a sexually violent predator as defined in K.S.A. 59-29a02 and amendments thereto, the agency with jurisdiction shall give written notice of such to the attorney general and the multidisciplinary team established in subsection (d), 90 days prior to:

(1) The anticipated release from total confinement of a person who has been convicted of a sexually violent offense,

except that in the case of persons who are returned to prison for no more than 90 days as a result of revocation of postrelease supervision, written notice shall be given as soon as practicable following the person's readmission to prison;

(2) release of a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial pursuant to K.S.A. 22-3305 and amendments thereto;

(3) release of a person who has been found not guilty by reason of insanity of a sexually violent offense pursuant to K.S.A. 22-3428 and amendments thereto; or

(4) release of a person who has been found not guilty of a sexually violent offense pursuant to K.S.A. 22-3428, and amendments thereto, and the jury who returned the verdict of not guilty answers in the affirmative to the special question asked pursuant to K.S.A. 22-3221 and amendments thereto.

(b) The agency with jurisdiction shall inform the attorney general and the multidisciplinary team established in subsection (d) of the following:

(1) The person's name, identifying factors, anticipated future residence and offense history; and

(2) documentation of institutional adjustment and any treatment received.

(c) The agency with jurisdiction, its employees, officials, members of the multidisciplinary team established in subsection (d), members of the prosecutor's review committee appointed as provided in subsection (e) and individuals contracting, appointed or volunteering to perform services hereunder shall be immune from liability for any good-faith conduct under this section.

(d) The secretary of corrections shall establish a multidisciplinary team which may include individuals from other state agencies to review available records of each person referred to such team pursuant to subsection (a). The team, within 30 days of receiving notice, shall assess whether or not the person meets the definition of a sexually violent predator,

as established in K.S.A. 59-29a02 and amendments thereto. The team shall notify the attorney general of its assessment.

(e) The attorney general shall appoint a prosecutor's review committee to review the records of each person referred to the attorney general pursuant to subsection (a). The prosecutor's review committee shall assist the attorney general in the determination of whether or not the person meets the definition of a sexually violent predator. The assessment of the multidisciplinary team shall be made available to the attorney general and the prosecutor's review committee.

(f) The provisions of this section are not jurisdictional, and failure to comply with such provisions in no way prevents the attorney general from proceeding against a person otherwise subject to the provision of K.S.A. 59- 29a01 *et seq.*, and amendments thereto.

59-29a04. Same; petition, time, contents; provisions of section are not jurisdictional. (a) When it appears that the person presently confined may be a sexually violent predator and the prosecutor's review committee appointed as provided in subsection (e) of K.S.A. 59-29a03 and amendments thereto has determined that the person meets the definition of a sexually violent predator, the attorney general may file a petition, within 75 days of the date the attorney general received the written notice by the agency of jurisdiction as provided in subsection (a) of K.S.A. 59-29a03 and amendments thereto, alleging that the person is a sexually violent predator and stating sufficient facts to support such allegation.

(b) The provisions of this section are not jurisdictional, and failure to comply with such provisions in no way prevents the attorney general from proceeding against a person otherwise subject to the provision of K.S.A. 59- 29a01 *et seq.*, and amendments thereto.

59-29a05. Same; determination of probable cause, hearing; evaluation; person taken into custody. (a) Upon filing of a petition under K.S.A. 59-29a04, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If such determination is made, the judge shall direct that person be taken into custody.

(b) Within 72 hours after a person is taken into custody pursuant to subsection (a), such person shall be provided with notice of, and an opportunity to appear in person at, a hearing to contest probable cause as to whether the detained person is a sexually violent predator. At this hearing the court shall: (1) Verify the detainer's identity; and (2) determine whether probable cause exists to believe that the person is a sexually violent predator. The state may rely upon the petition and supplement the petition with additional documentary evidence or live testimony.

(c) At the probable cause hearing as provided in subsection (b), the detained person shall have the following rights in addition to the rights previously specified: (1) To be represented by counsel; (2) to present evidence on such person's behalf; (3) to cross-examine witnesses who testify against such person; and (4) to view and copy all petitions and reports in the court file.

(d) If the probable cause determination is made, the court shall direct that the person be transferred to an appropriate secure facility, including, but not limited to, a county jail, for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination.

59-29a06. Same; trial; counsel and experts; indigent persons; jury, composition, peremptory challenges. Within 60 days after the completion of any hearing held pursuant to K.S.A. 59-29a05 and amendments thereto, the court shall

conduct a trial to determine whether the person is a sexually violent predator. The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent will not be substantially prejudiced. At all stages of the proceedings under this act, any person subject to this act shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist such person. Whenever any person is subjected to an examination under this act, such person may retain experts or professional persons to perform an examination of such person's behalf. When the person wishes to be examined by a qualified expert or professional person of such person's own choice, such examiner shall be permitted to have reasonable access to the person for the purpose of such examination, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court, upon the person's request, shall determine whether the services are necessary and reasonable compensation for such services. If the court determines that the services are necessary and the expert or professional person's requested compensation for such services is reasonable, the court shall assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf. The court shall approve payment for such services upon the filing of a certified claim for compensation supported by a written statement specifying the time expended, services rendered, expenses incurred on behalf of the person and compensation received in the same case or for the same services from any other source. The person, the attorney general, or the judge shall have the right to demand that the trial be before a jury. Such demand for the trial to be before a jury shall be filed, in writing, at least four days prior to trial. Number and selection of jurors shall be determined as provided in K.S.A. 22-3403, and amendments thereto. If no demand is made, the trial shall be before the court. A jury

shall consist of 12 jurors unless the parties agree in writing with the approval of the court that the jury shall consist of any number of jurors less than 12 jurors. The person and the attorney general shall each have eight peremptory challenges, or in the case of a jury of less than 12 jurors, a proportionally equal number of peremptory challenges.

59-29a07. Same; determination; commitment procedure; interagency agreements; mistrials; persons committed and later taken into custody after parole, arrest or conviction, procedure; persons found incompetent to stand trial, procedure. (a) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If such determination that the person is a sexually violent predator is made by a jury, such determination shall be by unanimous verdict of such jury. Such determination may be appealed. If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the secretary of social and rehabilitation services for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large. Such control, care and treatment shall be provided at a facility operated by the department of social and rehabilitation services. At all times, persons committed for control, care and treatment by the department of social and rehabilitation services pursuant to this act shall be kept in a secure facility and such persons shall be segregated at all times from any other patient under the supervision of the secretary of social and rehabilitation services and commencing June 1, 1995, such persons committed pursuant to this act shall be kept in a facility or building separate from any other patient under the supervision of the secretary. The department of social and rehabilitation services is authorized to enter into an interagency agreement with the department of corrections for the confinement of such persons. Such persons who are in the

confinement of the secretary of corrections pursuant to an interagency agreement shall be housed and managed separately from offenders in the custody of the secretary of corrections, and except for occasional instances of supervised incidental contact, shall be segregated from such offenders. If any person while committed to the custody of the secretary pursuant to this act shall be taken into custody by any law enforcement officer as defined in K.S.A. 21-3110 and amendments thereto pursuant to any parole revocation proceeding or any arrest or conviction for a criminal offense of any nature, upon the person's release from the custody of any law enforcement officer, the person shall be returned to the custody of the secretary for further treatment pursuant to this act. During any such period of time a person is not in the actual custody or supervision of the secretary, the secretary shall be excused from the provisions of K.S.A. 59-29a08 and amendments thereto, with regard to providing that person an annual examination, annual notice and annual report to the court, except that the secretary shall give notice to the court as soon as reasonably possible after the taking of the person into custody that the person is no longer in treatment pursuant to this act, and notice to the court when the person is returned to the custody of the secretary for further treatment. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct the person's release. Upon a mistrial, the court shall direct that the person be held at an appropriate secure facility, including, but not limited to, a county jail, until another trial is conducted. Any subsequent trial following a mistrial shall be held within 90 days of the previous trial, unless such subsequent trial is continued as provided in K.S.A. 59-29a06 and amendments thereto.

(b) If the person charged with a sexually violent offense has been found incompetent to stand trial, and is about to be released pursuant to K.S.A. 22-3305 and amendments thereto, and such person's commitment is sought pursuant to

subsection (a), the court shall first hear evidence and determine whether the person did commit the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on such person's own behalf, the extent to which the evidence could be reconstructed without the assistance of the person and the strength of the prosecution's case. If after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, the court shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

59-29a08. Same; annual examinations; discharge petitions by persons committed under this act over the secretary's objection at time of annual examination, procedure; transitional release; violating conditions of release. (a) Each person committed under this act shall have a current examination of the person's mental condition made once every year. The person may retain, or if the person is indigent and so requests the court may appoint a qualified professional person to examine such person, and such expert or professional person shall have access to all records concerning the person. The yearly report shall be provided to the court that committed the person under this act. The court shall conduct an annual review of the status of the committed person. Nothing contained in this act shall prohibit the person

from otherwise petitioning the court for discharge at this hearing. The secretary of the department of social and rehabilitation services shall provide the committed person with an annual written notice of the person's right to petition the court for release over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall forward the notice and waiver form to the court with the annual report. The committed person shall have a right to have an attorney represent the person at the hearing but the person is not entitled to be present at the hearing.

(b) If the court at the hearing determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be placed in transitional release, then the court shall set a hearing on the issue. At the hearing, the committed person shall be entitled to be present and entitled to the benefit of all constitutional protections that were afforded the person at the initial commitment proceeding. The attorney general shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to have experts evaluate the person on the person's behalf and the court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be placed in transitional release and if transitionally released is likely to engage in acts of sexual violence.

(c) If, after the hearing, the court or jury is convinced beyond a reasonable doubt that the person is not appropriate for transitional release, the court shall order that the person remain in secure commitment. Otherwise, the court shall order that the person be placed in transitional release.

(d) If the court determines that the person should be placed in transitional release, the secretary shall transfer the

person to the transitional release program. The secretary may contract for services to be provided in the transitional release program. During any period the person is in transitional release, that person shall comply with any rules or regulations the secretary may establish for this program and every directive of the treatment staff of the transitional release program.

(e) At any time during which the person is in the transitional release program and the treatment staff determines that the person has violated any rule, regulation or directive associated with the transitional release program, the treatment staff may remove the person from the transitional release program and return the person to the secure commitment facility, or may request the district court to issue an emergency ex parte order directing any law enforcement officer to take the person into custody and return the person to the secure commitment facility. Any such request may be made verbally or by telephone, but shall be followed in written or facsimile form delivered to the court by not later than 5:00 p.m. of the first day the district court is open for the transaction of business after the verbal or telephonic request was made.

(f) Upon the person being returned to the secure commitment facility from the transitional release program, notice thereof shall be given by the secretary to the court. The court shall set the matter for a hearing within two working days of receipt of notice of the person's having been returned to the secure commitment facility and cause notice thereof to be given to the attorney general, the person and the secretary. The attorney general shall have the burden of proof to show probable cause that the person violated conditions of transitional release. The hearing shall be to the court. At the conclusion of the hearing the court shall issue an order returning the person to the secure commitment facility or to the transitional release program, and may order such other further conditions with which the person must comply if the person is returned to the transitional release program.

59-29a09. Detention and commitment to conform to constitutional requirements. The involuntary detention or commitment of persons under this act shall conform to constitutional requirements for care and treatment.

59-29a10. Petition for transitional release; procedure. (a) If the secretary of the department of social and rehabilitation services determines that the person's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence if placed in transitional release, the secretary shall authorize the person to petition the court for transitional release. The petition shall be served upon the court and the attorney general. The court, upon receipt of the petition for transitional release, shall order a hearing within 30 days. The attorney general shall represent the state, and shall have the right to have the petitioner examined by an expert or professional person of such attorney's choice. The hearing shall be before a jury if demanded by either the petitioner or the attorney general. The burden of proof shall be upon the attorney general to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and that if placed in transitional release is likely to commit predatory acts of sexual violence.

(b) If, after the hearing, the court is convinced beyond a reasonable doubt that the person is not appropriate for transitional release, the court shall order that the person remain in secure commitment. Otherwise, the court shall order that the person be placed in transitional release.

(c) The provisions of subsections (d), (e) and (f) of K.S.A. 59-29a08 and amendments thereto shall apply to a transitional release pursuant to this section.

59-29a11. Transitional release, conditional release or final discharge; subsequent discharge petitions,

limitations. Nothing in this act shall prohibit a person from filing a petition for transitional release, conditional release or final discharge pursuant to this act. However, if a person has previously filed a petition for transitional release, conditional release or final discharge without the secretary of the department of social and rehabilitation services approval and the court determined either upon review of the petition or following a hearing, that the petitioner's petition was frivolous or that the petitioner's condition had not so changed that the person was safe to be at large, then the court shall deny the subsequent petition unless the petition contains facts upon which a court could find the condition of the petitioner had so changed that a hearing was warranted. Upon receipt of a first or subsequent petition from committed persons without the secretary's approval, the court shall endeavor whenever possible to review the petition and determine if the petition is based upon frivolous grounds and if so shall deny the petition without a hearing.

59-29a12. Same; secretary of social and rehabilitation services; responsible for costs; duties; reimbursement. The secretary shall be responsible for all cost relating to the evaluation and treatment of persons committed to the secretary's custody under any provision of this act. Reimbursement may be obtained by the secretary for the cost of care and treatment, including placement in transitional release, of persons committed to the secretary's custody pursuant to K.S.A. 59-2006 and amendments thereto.

59-29a13. Same; notice to victims of release of persons committed under this act. In addition to any other information required to be released under this act, prior to the release of a person committed under this act, the secretary shall give written notice of such placement or release to any victim of the person's activities or crime who is alive and whose address is known to the secretary. Failure to notify shall

not be a reason for postponement of release. Nothing in this section shall create a cause of action against the state or an employee of the state acting within the scope of the employee's employment as a result of the failure to notify pursuant to this action.

59-29a14. Same; special allegation of sexual motivation; procedure; withdrawal or dismissal. (a) The county or district attorney shall file a special allegation of sexual motivation within 10 days after arraignment in every criminal case other than sex offenses as defined in article 35 of chapter 21 of the Kansas Statutes Annotated and amendments thereto, when sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact finder.

(b) In a criminal case wherein there has been a special allegation, the state shall prove beyond a reasonable doubt that the accused committed the crime with a sexual motivation. The court shall make a finding of fact of whether or not a sexual motivation was present at the time of the commission of the crime, or if a jury trial is had, the jury, if it finds the defendant guilty, also shall find a special verdict as to whether or not the defendant committed the crime with a sexual motivation. This finding shall not be applied to sex offenses as defined in article 35 of chapter 21 of the Kansas Statutes Annotated and amendments thereto.

(c) The county or district attorney shall not withdraw the special allegation of sexual motivation without approval of the court through an order of dismissal of the special allegation. The court shall not dismiss this special allegation unless it finds that such an order is necessary to correct an error in the initial charging decision or unless there are evidentiary problems which make proving the special allegation doubtful.

59-29a15. Same; severability. If any provision of this act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application and, to this end, the provisions of this act are severable.

59-29a16. Same; confidential or privileged information and records. In order to protect the public, relevant information and records which are otherwise confidential or privileged shall be released to the agency with jurisdiction or the attorney general for the purpose of meeting the notice requirement provided in K.S.A. 59-29a03 and amendments thereto and determining whether a person is or continues to be a sexually violent predator. The provisions of this section shall be part of and supplemental to the provisions of K.S.A. 59-29a01 through 59-29a15 and amendments thereto.

59-29a17. Same; court records; sealed and opened by court order. Any psychological reports, drug and alcohol reports, treatment records, reports of the diagnostic center, medical records or victim impact statements which have been submitted to the court or admitted into evidence under this act shall be part of the record but shall be sealed and opened only on order of the court or as provided in K.S.A. 59-29a01 et seq. and amendments thereto. The provisions of this section shall be part of and supplemental to the provisions of K.S.A. 59-29a01 through 59-29a15 and amendments thereto.

59-29a18. Conditional release; examination by staff; report; review and hearing by court; orders. (a) During any period the person is in transitional release, the person committed under this act at least annually, and at any other time deemed appropriate by the treatment staff, shall be examined by the treatment staff to determine if the person's mental abnormality or personality disorder has so changed so

as to warrant such person being considered for conditional release. The treatment staff shall forward a report of its examination to the court. The court shall review the same. If the court determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be placed in conditional release, the court shall then set a hearing on the issue. The attorney general shall have the burden of proof to show beyond a reasonable doubt that the person's mental abnormality or personality disorder remains such that the person is not safe to be at large and that if placed on conditional release is likely to engage in repeat acts of sexual violence. The person shall have the same rights as enumerated in K.S.A. 59-29a06 and amendments thereto. Subsequent to either a court review or a hearing, the court shall issue an appropriate order with findings of fact. The order of the court shall be provided to the attorney general, the person and the secretary.

(b) If, after the hearing, the court is convinced beyond a reasonable doubt that the person is not appropriate for conditional release, the court shall order that the person remain either in secure commitment or in transitional release. Otherwise, the court shall order that the person be placed on conditional release.

59-29a19. Conditional release; plan of treatment; minimum term; hearing for final release; violating conditions of plan or release. (a) If the court determines that the person should be placed on conditional release, the court, based upon the recommendation of the treatment staff, shall establish a plan of treatment which the person shall be ordered to follow. This plan of treatment may include, but shall not be limited to: Provisions as to where the person shall reside and with whom, taking prescribed medications, attending individual and group counseling, maintaining employment, having no contact with children, not frequenting facilities, locations, events or otherwise in which children are likely to

be present and not engaging in activities in which contact with children is likely. Upon a showing by the person that the person accepts the plan of treatment and is prepared to follow it, the court shall release the person from the transitional release program.

(b) After a minimum of five years have passed in which the person has been free of violations of conditions of such person's treatment plan, the treatment staff, or other professionals directed by the court may examine such person to determine if the person's mental abnormality or personality disorder has changed so as to warrant such person being considered for final discharge. The person preparing the report shall forward the report to the court. The court shall review the same. If the court determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be entitled to final discharge, the court shall set a formal hearing on the issue. The attorney general shall have the burden of proof to show beyond a reasonable doubt that the person's mental abnormality or personality disorder remains such that such person is not appropriate for final discharge. The person shall have the same rights as enumerated in K.S.A. 59-29a06 and amendments thereto. Subsequent to either a court review or a hearing, the court shall issue an appropriate order with findings of fact. The order of the court shall be provided to the attorney general, the person and the secretary.

(c) If, after a hearing, the court is convinced beyond a reasonable doubt that the person is not appropriate for final discharge, the court shall continue custody of the person with the secretary for placement in a secure facility, transitional release program or conditional release program. Otherwise, the court shall order the person finally discharged. In the event the court does not order final discharge of the person, the person still retains the right to annual reviews.

(d) At any time during which the person is on conditional release and the professional person designated by the court in

the treatment plan to monitor the person's compliance with it determines that the person has violated any material condition of that plan, that professional person may request the district court to issue an emergency ex parte order directing any law enforcement officers to take the person into custody and return the person to the secure commitment facility. Any such request may be made verbally or by telephone, but shall be followed in written or facsimile form delivered to the court not later than 5:00 p.m. of the first day the district court is open for the transaction of business after the verbal or telephonic request was made.

(e) Upon the person being returned to the secure commitment facility from conditional release, notice thereof shall be given by the secretary to the court. The court shall set the matter for a hearing within two working days of receipt of notice of the person's having been returned to the secure commitment facility and cause notice thereof to be given to the attorney general, the person and the secretary. The attorney general shall have the burden of proof to show probable cause that the person violated conditions of conditional release. The hearing shall be to the court. At the conclusion of the hearing the court shall issue an order returning the person to the secure commitment facility, to the transitional release program or to conditional release, and may order such other further conditions with which the person must comply if the person is returned to either the transitional release program or to conditional release.

(f) The final discharge shall not prevent the person from being prosecuted for any criminal acts which the person is alleged to have committed or from being subject in the future to a subsequent commitment under this act.

59-29a20. Bail, bond, house arrest or other release; not eligible. Any person for whom a petition pursuant to this act has been filed and is in the secure confinement of the state shall not be eligible for bail, bond, house arrest or any other

measures releasing the person from the physical protective custody of the state, notwithstanding the provisions of K.S.A. 59-29a10 and amendments thereto.

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In The

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

MICHAEL T. CRANE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Kansas

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

Mr. Crane was charged in January 1993 with lewd and lascivious behavior for exposing himself to a woman and, in a separate incident occurring about 30 minutes later, with kidnapping, attempted aggravated criminal sodomy and attempted rape. All four charges were consolidated for trial. Prior to trial, Mr. Crane raised the possibility of an insanity defense. He was transported to Kansas' State Security Hospital in Larned, Kansas for a M'Naghten examination. Mr. Crane raised the issue that he was under the effect of a disassociative disorder "black out" at the time of the offense.

At Larned State Security Hospital, he was examined by Robert Huerter, a licensed master's level psychologist, and Douglas Hippe, a licensed psychologist. J.A. 27, 105. The purpose of the examination was to determine if Mr. Crane was experiencing some type of defect of reason due to a disease of his mind that would have rendered him unable to differentiate between right and wrong, or, if he could differentiate between right and wrong, to be unable to assess the nature and quality of his behavior. J.A. 25. Huerter, in addition to reviewing prior psychological records, police reports and other pertinent documentation on Mr. Crane, administered a Minnesota Multiphasic Personality Inventory, a Millon Clinical Multiaxial Inventory, a Bender Adult Intelligence Test, a memory for design tests, and a Weschler Adult Intelligence Test. J.A. 26, 28. Huerter's diagnosis was that Mr. Crane was not suffering from a disassociative disorder "black out" at the time of the offenses. J.A. 32. Heurter also stated Mr. Crane did not suffer from any type of mental disorder that would have affected his ability to

understand what he was doing. J.A. 33. Both Huerter and Hippe testified that they determined Mr. Crane had an antisocial personality disorder. J.A. 34, 110.

Mr. Crane was determined not to have suffered a disassociative disorder "black out" that would have absolved him of criminal responsibility under M'Naghten. Huerter opined Mr. Crane was simply malingering in an attempt to avoid criminal prosecution. J.A. 29-32. He was returned to the district court where he stood trial and was convicted of all four counts. He was given a sentence of 35 years-to-life. On appeal, the Kansas Supreme Court reversed his felony convictions finding the evidence did not support the crime of kidnapping and that the complaint upon which he stood trial did not vest the court with jurisdiction over the attempted sodomy and rape charges. *State v. Crane*, 260 Kan. 208, 918 P.2d 1256 (1996).

Mr. Crane was returned to the district court where Kansas re-filed the attempted rape and attempted aggravated sodomy charges. At this point, Mr. Crane had been incarcerated for approximately four and one-half years. Mr. Crane challenged the re-filing of the charges as a violation of Kansas' compulsory joinder provision of double jeopardy. His motion to dismiss the charges was denied by the trial court. Mr. Crane then entered into plea negotiations with Kansas. Eventually, an agreement was reached whereby Kansas would amend the charges against him to one count of Aggravated Sexual Battery. Mr. Crane was to plead guilty to this charge. The maximum sentence permitted by law was 3-to-10 years. Under the then existing Kansas statutes, Mr. Crane would be paroled within a few months of returning to prison. In

August 1997, Mr. Crane entered a plea to the amended complaint, was sentenced to 3-to-10 years, and was returned to prison. What Mr. Crane did not know was that Kansas entered into plea negotiations in order to ensure a conviction of a requisite "sexually violent offense" for it had already determined it would use the Kansas Sexually Violent Predator Act (Act) to "keep him off the streets." (Trial Tr., Vol. I, 262-274)

In January 1998, upon being released on parole, Mr. Crane was taken into custody and lodged in the county jail on Kansas' petition to have him declared a sexually violent predator. After a probable cause hearing, he was returned in February 1998 to Larned State Hospital for a "sexual predator evaluation". There, he was examined by Dr. Leonardo Mabugat, M.D. and Ken Eaves, a licensed master's level psychologist. In March, 1998, they issued their "Report to Court of Evaluation". J.A. 11-20. Their diagnosis was that Mr. Crane suffers from exhibitionism and antisocial personality disorder and that he meets the definition of a sexual predator as that term is defined in the Act. J.A. 19-20.

Mr. Crane filed a pretrial motion seeking summary judgment on the basis that Kansas' expert witnesses would not testify Mr. Crane's disorders rendered him unable to control his behavior. He relied upon *Kansas v. Hendricks*, 521 U.S. 346 (1997) as support for his motion. (Pet. for Cert. 23a) The trial court denied his motion. (Pet. for Cert. 23a)

During his sexual predator trial, Mr. Crane cross-examined both of Kansas' expert witnesses that performed the sexual predator evaluation at Larned State

Hospital. Dr. Mabugat testified that Mr. Crane suffered no disorder that renders him unable to control his behavior. J.A. 56-57, 70. Ken Eaves testified that while Mr. Crane's antisocial personality disorder does have some effect upon Mr. Crane's ability to control his behavior, it does not impair it to the degree he is unable to control his behavior. J.A. 99.

At trial, Kansas called two other expert witnesses – Robert Huerter and Douglas Hippe. Neither offered an opinion on whether Mr. Crane's disorders have any impact upon his volitional control. At the conclusion of the State's evidence, Mr. Crane moved for a directed verdict on the basis Kansas had not proven Mr. Crane's volitional control was impaired to the degree he was unable to control his behavior. The trial court denied his motion. (Trial Tr., August 12 and 13, 1998, 103-104)

Mr. Crane sought a jury instruction requiring the jury to decide whether either of his diagnosed disorders had the effect upon his volitional control as to render him unable to control his behavior. J.A. 138-150. Kansas objected to such an instruction arguing the jury need only be required, pursuant to the language of the Act, to determine if: (1) Mr. Crane had been convicted of Aggravated Sexual Battery; and, (2) he suffers from a mental abnormality or personality disorder which makes him likely to engage in future predatory acts of sexual violence, if not confined in a secure facility. J.A. 140, 156. In its argument, Kansas asserted that this Court upheld the Act as a whole and that no such qualifying language exists regarding personality disorders. J.A. 140. Kansas further argued that even if an "unable to control" standard was required, *Hendricks* only required it of "mental abnormalities" – not

"personality disorders". J.A. 140-141. The trial court agreed with Kansas and refused to give Mr. Crane's requested jury instruction. J.A. 142. The trial court made a specific finding that while volitional control is an applicable concept for persons suffering a mental abnormality, it is inapplicable to those with personality disorders. J.A. 143. The jury returned a verdict finding Mr. Crane had been convicted of aggravated sexual battery and that he has disorders that make it more probable than not that he will re-offend unless confined in a secure facility. Mr. Crane was then delivered to Larned State Security Hospital for care and treatment.

Mr. Crane appealed several issues to the Kansas Supreme Court including the trial court's denial to give a jury instruction on volitional impairment. Kansas argued that the Act as a whole was upheld by this Court in *Hendricks* and, therefore, Kansas need only prove those elements set out on the face of the Act, to wit: (1) the person has been convicted of, or charged with, a sexually violent offense; and (2) the person has a mental abnormality or personality disorder that makes him likely to commit future acts of sexual violence unless confined in a secure facility. Kansas argued that proof of an "unable to control" standard was inapplicable to "personality disorders'. In a unanimous decision, the Kansas Supreme Court rejected Kansas' arguments and held that due process required Kansas to prove the one constitutionally sufficient mental disability applicable to Mr. Crane – his mental disability so impairs his volitional control he is unable to control his dangerous sexual behavior. The Court also held that the trial court erred in refusing to so instruct the jury. *In re Care and Treatment of Crane*, 269

Kan. 578, 586, 7 P.3d 285 (2000). The Kansas Supreme Court remanded the case back to the district court for a new trial. *Id.* at 586.

SUMMARY OF ARGUMENT

Kansas v. Hendricks, 521 U.S. 346 (1997), did not create a new substantive due process standard for the commitment of the mentally ill. Instead, this Court carefully and narrowly followed cases such as *Minnesota ex rel Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940), in which the involuntary civil commitment statute required proof the individual had lost the ability to control his behavior. Noting that the Kansas Sexually Violent Predator Act (Act) sets forth similar criteria regarding volitional impairment, and that Hendricks himself admitted he was unable to control his dangerous sexual behavior, this Court found the Act's definition of Hendricks' mental disorder to be sufficiently precise and upheld its constitutionality in the face of a due process challenge.

Mr. Crane argued his personality disorder must likewise be shown to impair his volitional control to the degree he cannot control his dangerous behavior. Kansas disagreed, arguing successfully to the trial court that it need prove only the language of the Act, i.e., that: (1) Mr. Crane was convicted of aggravated sexual battery; and (2) Mr. Crane suffered from a personality disorder which made him likely to re-offend if not confined in a secure facility.

A unanimous Kansas Supreme Court rejected Kansas' argument and held that the disorder – by any name –

must render the individual unable to control his behavior. The Kansas Supreme Court ruled the trial court erred in refusing to so instruct the jury and remanded the case back to the district court for a new trial. *In re Crane*, 269 Kan. at 586.

The "unable to control" standard acknowledged by this Court as the constitutional mandate for the involuntary civil commitment of men who have served a prison sentence for a sexual offense serves to: (1) narrow the scope of the Act to a small group of individuals within the larger group of dangerous sex offenders; (2) conform the Act with other civil commitment statutes that have adhered to an "unable to control" standard; (3) qualify the Act as "civil" rather than "criminal" in nature by not extending its use to those who might be deterred by such confinement; and (4) hamper misuse for purposes of retribution.

By arguing for a degree of mental impairment that constitutes nothing more than a "likelihood" to commit further crimes, Kansas seeks a construction of the Act that will: (1) expand the reach of the Act to the majority of all sex offenders; (2) create a new and diluted due process standard of "likely to offend"; and (3) alter the nature of the Act by introducing deterrence, as well as the potential for retribution, by extending its reach to those who can and do control their behavior.

ARGUMENT

I. "UNABLE TO CONTROL BEHAVIOR" IS A WELL ESTABLISHED FORM OF MENTAL DISABILITY JUSTIFYING INVOLUNTARY CIVIL COMMITMENT

The Due Process Clause of the 14th Amendment imposes "substantive constitutional limitations" on the states' power to invoke civil commitment. *Jackson v. Indiana*, 406 U.S. 715, 737 (1972). The Due Process Clause of the 14th Amendment requires a state seeking to involuntarily commit an individual in a civil proceeding to prove: (1) the person suffers from a mental illness; and, (2) that mental illness causes the person to pose a danger to himself or others. *Addington v. Texas*, 441 U.S. 418, 426 (1979). This Court has upheld civil commitment schemes where the mental impairment is so severe, the person is incapable of caring for himself. *Heller v. Doe*, 509 U.S. 312, 325 (1993); *Youngberg v. Romero*, 457 U.S. 307, 318 (1982). This Court has approved civil commitment schemes in which the impairment is so severe, the person is absolved of criminal responsibility or is incompetent. *Jones v. United States*, 463 U.S. 354, 360 (1983); *Jackson v. Indiana*, 406 U.S. 715, 718 (1972). And this Court has upheld civil commitment schemes for dangerous sex offenders possessing an impairment of comparable severity that renders the person unable to control his dangerous sexual behavior. *Minnesota ex rel Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 274 (1940); *Kansas v. Hendricks*, 521 U.S. 346 (1997).

There can be no doubt that a person proven to have committed a sex offense possesses a degree of future

dangerousness. *Jones*, 463 U.S. at 364. But commitment based upon dangerousness alone is unconstitutional. *Foucha v. Louisiana*, 504 U.S. 71, 77-78 (1992). This Court has repeatedly recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. *Addington*, 441 U.S. at 425. And due process protection in the involuntary civil commitment context, as this Court has preserved it, has required proof of the existence of a mental illness that imparts a severe impairment. In the involuntary civil commitment of newly paroled sex offenders, neither the recognized "inability to care for ones' self" nor "absolution of criminal responsibility" are applicable. Hence, the only applicable severe mental impairment recognized in civil commitment jurisprudence is the impairment that attacks volitional control rendering the person unable to control his behavior.

Kansas argues it should enjoy the police power to forcibly commit an individual upon completion of a prison sentence for a sex offense if he has a disorder which merely predisposes him to offend again. Kansas argues it need only establish a "link" between the disorder and the inclination to offend again. (Pet'r. Br. 17). Kansas made this same argument before this Court in *Hendricks*. *Kansas v. Hendricks*, Transcript of Oral Argument, p.6, 1996 WL 721073 (U.S. Oral Arg.). The *Hendricks* Court, however, disagreed with such a minimalistic interpretation of the "mental illness" prong of due process. Tracing involuntary civil commitment back to our colonial period, this Court held that commitment is proper in, "narrow circumstances for the forcible civil detainment of people who are *unable to control their behavior* and who

thereby pose a danger to the public health and safety." *Hendricks*, 521 U.S. at 357 (emphasis added). An "unable to control behavior" standard was also approved in *Minnesota ex rel Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940). In *Pearson*, this Court upheld a civil commitment scheme directed at persons who, "by a habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire." *Pearson*, 309 U.S. at 273. Thus, this Court observed that an "unable to control behavior" standard justifying due process in the involuntary civil commitment context enjoys a long pedigree.

For the *Hendricks* Court, it was not the bare existence of a disorder that brought the Act within constitutional limits, but rather that the disorder rendered Mr. Hendricks unable to control his dangerous behavior. Because of this legally significant effect, the *Hendricks* Court found the Act to be similar to other civil commitment statutes it had upheld:

> "The pre-commitment requirement of a 'mental abnormality' or 'personality disorder' is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are *unable to control their dangerousness.*" *Id.* at 358. (emphasis added).
>
> "We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional

> factor, such as 'mental illness' or 'mental abnormality'. (citations omitted). These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a *volitional impairment rendering them dangerous beyond their control.*" *Id.* at 358. (emphasis added).
>
> "To the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's *inability to control his dangerousness*, the Kansas Act sets forth *comparable criteria* and Hendricks' condition doubtless satisfies those criteria." *Id.* at 360. (emphasis added).
>
> "Hendricks' abnormality does not consist simply of a long course of antisocial behavior, but rather it includes a specific, serious, and highly unusual inability to control his actions. (For example, Hendricks testified that, when he gets 'stressed out', he cannot 'control the urge' to molest children). (citations omitted). The law traditionally has considered this kind of abnormality akin to insanity for purposes of confinement." *Id.*, at 375. (Justice Breyer concurring).

During Mr. Crane's post-*Hendricks* sexual predator trial, Kansas argued against Mr. Crane's request for a jury instruction that would have required the jury to find that his personality disorder impaired his volitional control to the degree he could not control his behavior. J.A. 140-141. Kansas argued to the trial court, as it had before this Court in *Hendricks*, that it need only prove the existence of a personality disorder and then "link" it to dangerousness. The trial court agreed with Kansas and refused the

jury instruction, finding that volitional impairment rendering the person unable to control his behavior is an inapplicable impairment for those suffering a personality disorder. J.A. 142-143. A unanimous Kansas Supreme Court reversed, holding that the due process protection of the 14th Amendment, as preserved by this Court in *Hendricks*, mandates the government prove not only dangerousness, i.e., likely to offend in the future, but also the existence of a "mental abnormality" or "personality disorder" that makes it difficult, if not impossible, for the person to control his dangerous behavior for, as this Court defined the role mental disorder must play in a constitutionally permissible commitment, the existence of the disorder serves "to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." *Id.* at 358.

An "unable to control behavior" standard is required if the Act is to remain free of one of the principal objectives of a punitive statute – deterrence. As the *Hendricks* Court concluded in its analysis of whether the Act is punitive in nature, "Nor can it be said that the legislature intended the Act to function as a deterrent. Those persons committed under the Act are, by definition, suffering from a 'mental abnormality' or 'personality disorder' that *prevents them from exercising adequate control over their behavior.*" *Id.* at 362 (emphasis added). Kansas offers no basis for concluding deterrence won't immediately affix to the Act if the reach of the Act is extended to those who can and do exercise control over their behavior.

Mr. Crane was not diagnosed with a disorder that causes him to be unable to care for himself. Nor was he

diagnosed as criminally irresponsible or incompetent. Indeed, prior to his criminal trial in 1993, he was unsuccessful in seeking a defense to criminal responsibility. Under *Pearson* and *Hendricks*, due process required Kansas to prove Mr. Crane was unable to control his behavior. Kansas presented no evidence at Mr. Crane's sexual predator trial, before the Kansas Supreme Court or to this Court to suggest an "unable to control behavior" standard was inapplicable to Mr. Crane or that one of the other two accepted standards should have been proven. Instead, Kansas simply urges involuntary commitment under the Act based upon proof of a prior conviction and a personality disorder that makes Mr. Crane more likely than not to offend again. But proving the effect of a disorder to do no more than incline the person to offend in the future is simply proving the person to be dangerous. While dangerousness is an element to be proven, the distinguishing element that separates persons appropriate for civil commitment from those appropriately dealt with exclusively through the criminal justice system is the effect of the disorder upon the individual's self control. If it has no such effect, the person can only be said to be dangerous and no more. By diluting the severity of the constitutionally mandated "mental illness" to a level consistent with mere "temptation", Kansas would wield a police power with few, if any, limits. Such a power might be used by law enforcement to extend the confinement time of an individual law enforcement felt deserved a longer prison sentence. (see III(3) *infra*). In effect, Kansas seeks an interpretation of the Act that will permit Kansas to involuntarily confine individuals based upon dangerousness alone and commitment based upon

dangerousness alone is clearly unconstitutional. *Foucha*, 504 U.S. at 77-78.

II. THE KANSAS SUPREME COURT CORRECTLY APPLIED *HENDRICKS* TO MR. CRANE'S CASE

Kansas is incorrect in its statement that the *Crane* decision by the Kansas Supreme Court was "nonsensical". The Kansas Supreme Court was careful to follow this Court's narrow ruling applicable to those who were first criminally prosecuted by Kansas and then, upon release from prison, subjected to further confinement for care and treatment. The Kansas Supreme Court found these clear, unambiguous passages of *Hendricks* compelling:

> "Accordingly, States have in certain narrow circumstances provided for the forcible civil detainment of people who are *unable to control their dangerousness.*" *Hendricks*, 521 U.S. at 357. (emphasis added).

"We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality'. (citations omitted) These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a *volitional impairment rendering them dangerous beyond their control.*" *Id.* at 358. (emphasis added).

"The Kansas Act is plainly of a kind with these other civil commitment statutes: It requires a finding of future dangerousness, and then links that finding to the existence of a

'mental abnormality' or 'personality disorder' that makes it *difficult, if not impossible for the person to control his dangerous behavior.*" *Id.* at 358. (emphasis added).

"The pre-commitment requirement of a 'mental abnormality' or 'personality disorder' is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are *unable to control their dangerousness.*" *Id.* at 358. (emphasis added).

"To the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's *inability to control his dangerousness*, the Kansas Act sets forth comparable criteria and Hendricks' condition doubtless satisfies those criteria." *Id.* at 360. (emphasis added).

"Hendricks even conceded that, when he becomes 'stressed out', he *cannot 'control the urge'* to molest children. This admitted *lack of volitional control*, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." *Id.* at 360. (emphasis added).

"Nor can it be said that the legislature intended the Act to function as a deterrent. Those persons committed under the Act are, by definition, suffering from a 'mental abnormality' or 'personality disorder' that *prevents them from exercising adequate control over their behavior*. Such persons are therefore unlikely to be deterred by the threat of confinement." *Id.* at 362 (emphasis added).

> "This requirement again demonstrates that Kansas does not intend an individual committed pursuant to the Act to remain confined any longer than he suffers from a mental abnormality *rendering him unable to control his dangerousness.*" *Id.* at 364. (emphasis added).

A unanimous Kansas Supreme Court rejected Kansas' argument that the "unable to control" standard followed in *Hendricks* applies only to "mental abnormalities" and not to "personality disorders". It rejected Kansas' argument that it need only prove Mr. Crane had a prior conviction and a personality disorder making him likely to re-offend unless locked up in a secure facility. The Court correctly interpreted and applied the *Hendricks* opinion to the fact pattern presented in Mr. Crane's case. While properly deferring to the legislature's authority to choose the terminology describing mental disorders, the Court remained focused upon the legal significance of the effect the disorder must visit upon the individual, rather than the name of the disorder. For Mr. Crane, as with Mr. Hendricks, the Court properly held that the disorder must impair Mr. Crane's volitional capacity to the degree he cannot control his dangerous behavior.

Kansas argues that the Kansas Supreme Court incorrectly read into the Act a requirement that Kansas must prove a volitional impairment of such degree as to render the individual unable to control his behavior. Kansas argues that, "nothing in any of the opinions states, declares or holds that [this Court in *Hendricks*] was adopting a previously unknown substantive due process requirement regarding volitional control." (Pet'r. Br. 18).

Mr. Hendricks was diagnosed with a "mental abnormality" which, as defined in K.S.A. 59-29a02(b) of the Act, is "a congenital or acquired condition affecting the emotional or volitional capacity . . . " (Pet'r. Br. 1a). Mr. Hendricks also conceded at trial he was unable to control his dangerous sexual behavior. *Hendricks*, 521 U.S. at 360. This Court upheld the Act against Hendricks' due process challenge noting that,

> "[T]his admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings. Hendricks' diagnosis as a pedophile, which qualifies as a 'mental abnormality' under the Act, thus plainly suffices for due process purposes." *Id.* at 360.

This Court went on to hold that the Act is consistent with other civil commitment statutes that have been upheld, "[t]o the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's inability to control his dangerousness, the Kansas Act sets forth comparable criteria. . . . " *Id.* at 360.

In arguing the Kansas Supreme Court invented a new substantive due process requirement of impaired volitional control, Kansas ignores the clear, unambiguous language of *Hendricks*. Although Kansas now argues the Kansas Supreme Court incorrectly created the notion of volitional impairment, it argued differently at the trial level. The central theme of Kansas' argument to the trial

court was to acknowledge *Hendricks* requires that a "mental abnormality" must be shown to impair volitional control to the degree the person is unable to control his behavior, but that "personality disorders" are exempt from this Court's decision in *Hendricks*. J.A. 141. The trial court adopted that argument holding that the Act made volitional control applicable to mental abnormalities but not to personality disorders. J.A. 143.

A unanimous Kansas Supreme Court rejected Kansas' argument that *Hendricks* is not applicable if the mental disability is called a "personality disorder" instead of a "mental abnormality". And, contrary to Kansas' assertion (Pet'r. Br. 20) that the Kansas Supreme Court ruled "personality disorders", by definition, can never satisfy substantive due process requirements, the Court remanded the matter back for a new trial in which the jurors are to be instructed they must find Mr. Crane's personality disorder impairs his volitional control to the degree he cannot control his behavior. In reversing the trial court and remanding for a new trial, the Kansas Supreme Court did not create a new substantive due process standard of "unable to control behavior". It simply applied the existing one.

III. AN IMPAIRMENT STANDARD OF "LIKELY TO OFFEND" DOES NOT SATISFY THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT

"This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington*, 441 U.S. at 425. "The [standard of proof]

serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington*, 441 U.S. at 423. "In cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.' " *Addington*, 441 U.S. at 425 (quoting *Tippet v. Maryland*, 436 F. 2d 1153, 1166 (CA4 1971)).

While the foregoing statements were made in the context of analyzing the burden of proof mandated by the Due Process Clause of the 14th Amendment, the value to be placed on individual liberty is no less in the context of the substantive due process question raised in this appeal.

Our civil commitment jurisprudence reflects the great value our society places on individual freedom. Individuals who are mentally ill but not dangerous may not be forcibly committed. *O'Connor v. Donaldson*, 422 U.S. 563 (1975). Individuals who are dangerous but not mentally ill may not be forcibly committed. *Foucha*, 504 U.S. 77-78. due process mandates a person may not be involuntarily committed absent proof he is both mentally ill and, as a result, dangerous. *Addington*, 441 U.S. at 426-427; *Jones*, 463 U.S. at 363; *Foucha*, 504 U.S. at 75-76. "[T]he Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society." *Foucha*, 504 U.S. at 77-78, quoting *Jones*, 463 U.S. at 368, 370. "[K]eeping Foucha against his will in a mental institution is improper absent a determination in civil commitment proceedings of a

current mental illness and dangerousness." *Foucha*, 504 U.S. at 78.

> "In *Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed.2d 552 (1980), we held that a convicted felon serving his sentence has a liberty interest, not extinguished by his confinement as a criminal, in not being transferred to a mental institution and hence classified as mentally ill without appropriate procedures to prove he was mentally ill." *Foucha*, 504 U.S. at 78-79.

Proving a person is "mentally ill" in the civil commitment context has meant proving the person's mental disability: (1) renders him unable to care for himself. *Heller*, 509 U.S. at 325; (2) renders him criminally irresponsible or incompetent. *Jones*, 463 U.S. at 360; or (3) renders him unable to control his behavior. *Pearson*, 309 U.S. 273. Mr. Crane was entitled to no less due process protection for, "there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." *Foucha*, 504 U.S. at 79, quoting *Jackson v. Indiana*, 406 U.S. 715, 724 (1972), quoting *Baxstrom v. Herold*, 383 U.S. 107, 111-112 (1966).

There are three constitutional problems with Kansas' argument that Mr. Crane was properly committed upon a showing that: (a) he was convicted of a sexually violent offense; and (b) he suffers from a personality disorder which makes him likely to offend if not confined. All three problems arise from the constitutionally deficient impairment implicit in the phrase, "makes him likely to offend". The first problem is that such a minimal impairment does not comport with any form of "mental illness" recognized by this Court. The second problem is that the

resultant expansion of the Act to those who can control their behavior produces a civil commitment scheme that is coextensive with the criminal law. The third problem is that removing the historical impediment of proving a legally significant level of impairment, the Act can readily be misused for retribution.

1. "Likely to offend" does not constitute "mental illness"

Historically, the involuntary commitment power of the states has been limited in application to those suffering a severe deterioration in perceptive, cognitive or volitional capacity. *Addington*, 441 U.S. at 412 (psychotic schizophrenia with paranoid tendencies); *O'Connor*, 422 U.S. at 565 (paranoid schizophrenia); *Jones*, 463 U.S. at 359-360 (paranoid schizophrenia); *Foucha*, 504 U.S. at 75 (drug induced psychosis); *Pearson*, 309 U.S. at 273 (utter lack of power to control sexual impulses); *Hendricks*, 521 at 360 (inability to control behavior). As involuntary civil commitment law has evolved in the United States, only three forms of mental impairment have been recognized as satisfying due process: (1) an inability to care for ones self; (2) incompetence or criminal irresponsibility; and (3) an inability to control one's behavior. States are free to choose language defining mental health concepts. *Hendricks*, 521 U.S. at 359. But the legal significance of the impairment visited upon the individual must account for issues such as individual responsibility and competency. *Id.* at 359.

"Likely to offend" does not imply any negative effect upon an individual's ability to care for himself, his criminal responsibility or competency, or an inability to control his behavior. "Likely to offend" is a vague, imprecise term that could be satisfied by a person's decision to continue to offend for purely hedonistic reasons. An individual who receives a large sum of-money for transporting controlled substances, who perceives very little risk of apprehension and has no regard for the harm he causes to others is "likely to continue to offend". Certainly such a person represents a threat to society and if caught should be dealt with through our criminal justice system. But unless he suffers from a mental disorder so severe as to render him unable to care for himself, or criminally incompetent or criminally irresponsible, or unable to control his dangerous behavior, this Court's precedents will not suffice to uphold an involuntary civil commitment to a mental hospital.

2. The Act becomes coextensive with the criminal law

Kansas wants the police power to commit anyone with a disorder who is likely to offend. Such an Act would reach most sex offenders. Dr. Mabugat opined that over 75% of all Kansas prisoners suffer from an antisocial personality disorder. *In re Crane*, 269 Kan. at 585. Assuming sex offenders as a group suffer a like percentage of antisocial personality disorders, 75% of all sex offenders in Kansas prisons, like Mr. Crane, would be subject to involuntary commitment.

Given such a vast reach of the Act, coupled with the provision under K.S.A. 59-29a02(a) authorizing the employment of the Act against persons who have not been convicted but are simply charged with a sexually violent offense, the Act becomes coextensive with the criminal justice system. Such an interpretation of the Act would provide Kansas with the option of proceeding against a defendant in a criminal proceeding in which Kansas must prove beyond a reasonable doubt that the defendant did each element of the criminal offense, or prove beyond a reasonable doubt that he has been charged with a sexually violent offense, he has a disorder and the disorder makes the odds more probable than not that he will offend in the future unless confined. The Act could, and would, be used for punitive purposes. Kansas might feel it would be easier to prove a "more probable than not" case than a "beyond a reasonable doubt" case, or an indefinite sentence might be more appealing to the state than a fixed term.

The Act would also take on a function of deterrence as it would be extended to those who can and do control their criminal behavior. This Court, in analyzing Hendricks' claim that the Act is criminal in nature, observed that the Act does not serve a primary objective of the criminal law – deterrence. This Court noted that because the Act is limited in its use to those who, by definition, cannot control their dangerous behavior, they are unlikely to be deterred by the threat of confinement. *Hendricks*, 521 U.S. at 362-363.

3. Using the Act for retribution

The darkest feature of an Act requiring less than the historical severity of impairment is its amenability to misuse for retribution. Such was the fate for Mr. Crane. His case is the case warned of in the *Hendricks* concurring opinion, "My brief, further comment is to caution against dangers inherent when a civil confinement law is used in conjunction with the criminal process, whether or not the law is given retrospective application." *Id.* at 371-372. "If the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function." *Id.* at 373. "We should bear in mind that while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone." *Id.* at 373.

> "On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it." *Id.* at 373.

Mr. Crane was sentenced to a 35 years-to-life sentence for kidnapping, attempted rape and attempted aggravated sodomy. On appeal, the Kansas Supreme Court reversed his kidnapping conviction for insufficiency of evidence and his attempted rape and attempted sodomy charges on jurisdictional grounds. *State v. Crane,*

260 Kan. 208, 918 P.2d 1256 (1996). Remanded back to the district court for a new trial on the attempted rape and attempted aggravated sodomy charges, Mr. Crane entered into plea negotiations with Kansas. He agreed to plead guilty to one count of aggravated sexual battery, a felony carrying a maximum sentence of 3-to-10 years. Under Kansas law at that time, a prisoner was released on parole upon completing one half of his maximum sentence. As Mr. Crane had served approximately 4½ years, pleading to aggravated sexual battery meant he would soon be paroled. Unknown to Mr. Crane during plea negotiations was that Kansas had an integrated plan to use the Act in conjunction with the criminal justice system. Step one was to assure a conviction of the requisite "sexually violent" offense. Step two was to then follow with a sexual predator action against him upon his parole. The victim was consulted during the plea negotiations to assure her that allowing Mr. Crane to plead to a 3-to-10 year sentence was just the first step in an integrated program to "keep him off the streets." While incorporating a victim into discussions between parties regarding a civil commitment proceeding might violate confidentiality rules, such incorporation during criminal proceedings is a constitutional requirement in Kansas under the Victims Rights amendment. Clearly, the *mens rea* of Kansas, by confiding in her during the criminal proceedings of its intent to invite a plea in order to follow with the Act, evidenced its motive for using the Act – retribution.

Evidence of Kansas' use of the Act in conjunction with the criminal justice system surfaced during cross-examination of the victim during Mr. Crane's sexual

predator trial. The following excerpts of her testimony appear in Trial Tr., Vol. I, 262-264:

Q. (By Mr. Donham) "I had just asked you a question before Mr. Toth objected, saying that if I understand your testimony, you have testified that at the time you were contacted by the District Attorney's office, they told you that along with entering into this plea negotiation, for him to enter a plea of guilty to aggravated sexual battery, that they would use the Sexual Predator Act against him."

A. (By Ms. Shy) "I believe the context of that was after things were settled, whatever plea or sentence was agreed to, then they would go after him with the Sexual Predator Act to see if we could keep him off the streets."

Q. "That's what they told you when they were telling you about the plea agreement they were working out?"

A. "It was in response to my worries that he was going to get off. Don't worry, you know, because it's not over yet."

. . . . . .

Q. "And they contacted you about the fact that Mr. Crane was working things out with the D.A.'s office to enter a plea in this case. Is that right?"

A. "I probably don't have the same perspective you do as to what was happening, but, yes, I was contacted and informed that there was in fact still more things going on that I needed to be aware of."

Q. "Okay. Those things being that Mr. Crane would be entering a plea?"

A. "Yes."

Q. "And you were upset because you didn't think he was going to serve enough time?"

A. "That's correct."

Q. "But you were told that they would also employ the Sexual Predator Act against him?"

A. "If the outcome wasn't favorable, yeah, they would go after him because he was a repeat offender, and so they were going to go after him to try and keep him off the streets, which is why we were here to begin with."

Kansas, following the above disclosures, engaged the victim in the following colloquy appearing in Trial Tr., Vol. I, 268-270:

Q. (By Mr. Toth) "We're back to square one where we've got to start all over, correct?"

A. "That's correct."

Q. "And we've got to start with less charges than we had back in 1993?"

A. "Yes."

Q. "So did I discuss with you what very few options actually we did have at that point?"

A. "Yes."

Q. "And it was mutually agreed upon between you and I that because the charges that Mr. Crane was facing were so small, that being

what we were left to retry in front of the Court, that we ought to take a conviction on the – that we talked about his conviction, correct?"

A. "Yeah."

Q. "Okay?"

A. "Yes."

Q. "And at that point in time, were you aware that Mr. Crane had almost served out the maximum amount of time that he could serve?"

A. "Yes."

Q. "Okay. And we discussed that there might be a possibility that we could file a predator action, correct?"

A. "Yes. Yes."

Q. "And did I discuss with you that one of the prerequisites of a predator action is one has to be convicted of a sexually violent offense?"

A. "Yes."

Q. "And would you agree that aggravated sexual battery is a sexually violent offense?"

A. "I'll take that. I'm not a lawyer."

Q. "We had some discussions along those lines, right?"

A. "Yes."

Q. "So would it be fair to say that for a crime that this Court gave a 35-to-life sentence to Mr. Crane, he only served a little over four years?"

A. "That's correct."

Q. "And understandably, you're very upset about how the system treated you in this case, right?"

A. "Yes, very."

The victim went on to make additional statements evidencing a clear intent on the part of Kansas to use the Act in a manner warned of in the concurring opinion of *Hendricks* – in conjunction with the criminal justice system to recover confinement time Kansas "understandably" felt cheated out of by "the system".

A. "We did not discuss what using the Sexual Predator Act entailed until later. When we were talking about reaching a plea or some kind of an agreement, it was suggested it was the best way to go in order to be able to go down the line and use that option." (Trial Tr., Vol. I, 272).

A. "To my knowledge, I was not aware that there was an option of going to trial and going through this or agreeing to the plea and then using the Sexual Predator Act. As I was – as I understood, this was the only option, but if we can get a – some kind of a conviction, then we can use this option later down the road to make sure he stays off the street." (Trial Tr., Vol. I, 274).

Clearly, Kansas sought to recover some, if not all, of the 35 year-to-life prison sentence that it lost on appeal. And it chose the Act as the instrument to restore the confinement time it and the victim believed Mr. Crane deserved. It was able to succeed at the trial level because it was unimpeded by a requirement to prove Mr. Crane's

personality disorder rendered him unable to control his dangerous sexual behavior. His prior conviction and the existence of his personality disorder were not contested. The only remaining element requiring proof was his likelihood to re-offend. As this Court observed in *Jones*, 463 U.S. at 364, "The fact that the accused was found to have committed a criminal act is strong evidence that his continued liberty could imperil the preservation of public peace." And as the experts for Kansas opined, "[the best predictor of future behavior is past behavior]". J.A. 50, 121. Recovering confinement time lost to "the system" via the Act was easily accomplished because Kansas was unimpeded by the necessity to establish the existence of any of the forms of mental disabilities justifying involuntary commitment. Kansas was enabled to use the Act against Mr. Crane for retribution.

CONCLUSION

This Court should affirm the decision of the Kansas Supreme Court. The Due Process Clause of the 14th Amendment places constraints upon the states' police power to involuntarily civilly commit its citizens. There must exist a mental illness and, as a result, the person must be dangerous to self or others. The mental illness accepted in the involuntary civil commitment context is one rendering the person unable to control his dangerous sexual behavior. This Court recognized this constitutional mandate in *Hendricks*. The Kansas Supreme Court recognized it in *In re Crane*. Kansas seeks relief from the constraint of due process in order to exercise a police power over anyone whose disorder simply makes them

more likely than not to offend again. This Court should not vest Kansas with that unbridled police power. If such a power is gained, the civil nature of the Act will evaporate. By reaching those who control their behavior, the Act will assume a deterrent effect. By permitting its use against those who are merely likely to re-offend, there will exist no restraint on its use for retribution. Thus, the Act will achieve the two objectives of a criminal statute – deterrence and retribution. While being criminal in nature, the Act does not extend the full constitutional protections mandated by the criminal law, such as the burden of proof. Hence, extending the reach of the Act beyond those who are unable to control their behavior will convert the Act into an unconstitutional tool in the hands of the State. The Kansas Supreme Court correctly interpreted the *Hendricks* decision to the facts in Mr. Crane's case. The opinion of the Kansas Supreme Court should be affirmed and this Court should reiterate the importance of the "unable to control behavior" standard historically followed in involuntary civil commitment jurisprudence.

Respectfully submitted,

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IN THE
Supreme Court of the United States

IN THE MATTER OF THE CARE AND TREATMENT
OF MICHAEL T. CRANE

STATE OF KANSAS,

Petitioner,

v.

MICHAEL T. CRANE,

Respondent.

REC'D TEAM 11
AUG 31 2001
UNSCANNED

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF KANSAS

REPLY BRIEF

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QUESTION PRESENTED

Whether the Fourteenth Amendment's Due Process Clause requires a State to prove that a sexually violent predator "cannot control" his criminal sexual behavior before the State can civilly commit him for residential care and treatment?

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ARGUMENT

I. *KANSAS V. HENDRICKS* DID NOT CREATE A NEW "CANNOT CONTROL" REQUIREMENT IN THE CIVIL COMMITMENT CONTEXT, NOR IS A NEW DUE PROCESS STANDARD WARRANTED

With all due respect, respondent—and his *amici*—ignores this Court's long line of cases that emphasize two substantive, constitutional requirements for civil commitment: (1) a serious mental problem coupled with (2) dangerousness to self or others. *See, e.g., Seling v. Young*, 531 U.S. 250 (2001); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Addington v. Texas*, 441 U.S. 418 (1979); *Humphrey v. Cady*, 405 U.S. 504 (1972). *Kansas v. Hendricks* very plainly reiterated and applied those two basic requirements in upholding the Kansas law at issue in this case against substantive due process challenges.[1]

The psychiatrists themselves recognize the limitations of their trade, but once again urge this Court, as they did in *Hendricks*, to constitutionalize a particular, debatable definition for those subject to involuntary civil commitment. Such efforts run contrary to the numerous statements in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) which recognizes the

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[1] Indeed, respondent chooses his words very carefully in his brief, more than once recognizing that cases such as *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940), involved a *statute* that itself required proof of utter or total lack of volitional control, or had been so interpreted by the state supreme court. *See, e.g.*, Brief for Respondent at 6, 7. As discussed more fully in the text above, the Kansas statute at issue here neither expressly includes such a requirement, nor has it been so construed by the Kansas Supreme Court. Indeed, the Kansas Supreme Court in this case expressly rejected any notion that the Kansas law includes such a requirement.

limitations of psychiatry.[2] Nonetheless, respondent and his *amici* press the argument that there is a constitutional requirement that the state prove "inability to control" behavior, even though the Court has never articulated such a due process requirement in any of its opinions and there is no consensus within the mental health community as to whether such a requirement is appropriate or, even if so, what it would mean.

Moreover, in arguments reminiscent of the challenges made (and rejected by this Court) in the *Hendricks* case itself, respondent and his *amici* contend that the Kansas law is punitive, criminal, and retributive. This contention is both erroneous on the merits and outside the scope of the question presented in this case. Respondent filed his own petition for a writ of *certiorari* in this case, raising *ex post facto*/ punishment issues, but this Court denied review. Respondent and his *amici* should not be permitted to bring through a back door issues that this Court turned away at the front door.

A. *Hendricks*, Like The Court's Previous Civil Commitment Decisions, Requires A Serious Mental Problem Coupled With Dangerousness

In his concurring opinion in *Kansas v. Hendricks*, Justice Kennedy observed that "[a]s all members of the Court seem to agree, then, the power of the state to confine persons who, by reason of mental disease or mental abnormality, constitute

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[2] *See, e.g., DSM-IV*, at xxi ("it must be admitted that no definition adequately specifies precise boundaries for the concept of 'mental disorder.'"); *id.* at xxiii ("a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder"); *id.* at xxvii ("The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination, and competency.").

a real, continuing, and serious danger to society is well established." 521 U.S. at 372. That statement is an accurate summary of the principles this Court has established and reiterated in a long line of mental health cases. *See, e.g., Seling v. Young*, 531 U.S. 250 (2001); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Addington v. Texas*, 441 U.S. 418 (1979); *Humphrey v. Cady*, 405 U.S. 504 (1972). As explained fully in Kansas's opening merits brief, nothing in this Court's decision in *Kansas v. Hendricks* deviated from those precedents.

Nor is respondent or his *amici* correct in arguing that this Court's decision in *Hendricks* was limited to the narrow, specific facts presented in that case. In essence, respondent and his *amici* are contending that this Court in *Hendricks* adopted a limiting construction of the Kansas law that the Kansas Supreme Court did not purport to adopt in that case, and in fact expressly rejected in this case.

But this Court has recently reiterated that federal courts generally are not free to provide limiting constructions of state statutes unless such a construction is reasonable and readily apparent. *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000). And there is no plausible argument here that a limiting construction is either reasonable or readily apparent, since the Kansas Supreme Court itself expressly concluded that the Kansas law itself does *not* require a showing of uncontrollable dangerousness. *See* Pet. App. 8a.

Respondent and his *amici* (most of whom made these very same or similar arguments as *amici* supporting Mr. Hendricks in *Kansas v. Hendricks*) also contend that in *Hendricks* this Court only recognized deference to the States' choices regarding what constitutes "mental illness" in this context while apparently creating a rigid volitional impairment requirement. But the notion of volitional impairment and its relevance here is intertwined with the very concept of "mental illness." The two concepts are not necessarily separate and

distinct, and nothing in *Hendricks* suggests that the Court was giving deference to the States in only *portions* of their efforts to define "mental illness" for legal purposes. With due acknowledgement to Yogi Berra, this is *deja vu* all over again from *Kansas v. Hendricks*, when these very same *amici* unsuccessfully argued to the Court that there is a single definition of "mental illness" and they alone knew what it was.

Nor do respondent and his *amici* give any credit to the Court's following clear statement in *Hendricks*: "Those persons committed under the Act are, by definition, suffering from a 'mental abnormality' or a '*personality disorder*' that prevents them from exercising *adequate* control over their own behavior." 521 U.S. at 362 (emphasis added). The Court in *Hendricks* certainly was aware of the personality disorder alternative under the statute, and the Court also recognized that total or complete lack of volitional control is not a constitutional prerequisite to involuntary commitment for residential care and treatment.[3]

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[3] The National Association of Criminal Defense Lawyers, *et al.*, makes the completely unfounded suggestion that Kansas is using the Act "to target individuals who can control their impulses, subjects them to punitive confinement conditions and deprives them of access to treatment ...." Brief of the NACDL, *et al.*, at 15. There is no basis in the record in this case or elsewhere for the assertions that Kansas is "targeting" individuals who can control their impulses, subjecting anyone in the sex offender treatment program to "punitive confinement conditions" or depriving "them of access to treatment." Indeed, the Court in *Hendricks* rejected those very assertions, and respondent here does not himself make such unfounded allegations. Rather, as explained in note 6 below, respondent clearly has received meaningful treatment and recognizes that it has been of tremendous benefit to him.

B. Inability To Control Behavior Has Never Been The *Sole* Basis For Civil Commitment

Although perceived lack of volitional control has certainly been *one* basis for civil commitment, it has by no means ever been the *sole* basis, as respondent and his *amici* try to suggest.[4] Indeed, sources regarding eighteenth and nineteenth century mental health laws and practices uniformly indicate that the States enjoyed wide latitude in determining the bases for civil commitment.[5] The States certainly did not limit involuntary civil commitment to only those who were "utterly" or "totally" unable to control their behavior. And no eighteenth or nineteenth century court ever suggested that the Constitution so limited the States.

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[4] *See, e.g.*, W. Blackstone, Vol. 1, *Commentaries on the Law of England* *304 (1765) (involuntary commitment justified for "lunatics," "persons under frenzies," those "who lose their intellects by disease," and those "judged by the court of chancery incapable of conducting their own affairs"); A. Deutsch, *The Mentally Ill in America*, at 418-22 (1937) (discussing the variety of common law bases for involuntary commitment in the last quarter of the eighteenth century and first half of the nineteenth century); *id.* at 422 (discussing the case of Josiah Oakes in 1845 in which "Chief Justice Shaw ruled that restraint of the insane was justified not only by regard for public or personal safety, but by considerations of remedial treatment"); G. Grob, Mental Institutions in America: Social Policy to 1875 at 9 (1973) (variety of bases in colonial times).

[5] *See, e.g.*, G. Grob, *Mental Institutions in America: Social Policy to 1875*, at 3, 132 (indicating that mental hospitals in the nineteenth century cared for a variety of individuals, including those "whose behavior was deemed socially disruptive by the community", "abnormal", or who "because of behavioral problems [were] deemed dangerous to the security either of the family or of society"); A. Deutsch, *The Mentally Ill in America*, at 418-22 (discussing the variety of common law bases for involuntary commitment in the last quarter of the eighteenth century and first half of the nineteenth century).

C. A "Cannot Control" Requirement Would Be Impractical And Unworkable

As demonstrated in the State's opening brief, as well as the brief of the Association for the Treatment of Sexual Abusers, there is simply no basis in medical or scientific fact for actually determining whether a mentally disturbed sex offender "cannot control" his criminal sexual behavior. Virtually no one has complete and total lack of volitional control, even those who suffer from schizophrenia or serious psychoses. *See, e.g.,* Brief For The Association For The Treatment Of Sexual Abusers As *Amicus Curiae* In Support of Petitioner, in *Kansas v. Crane*, No. 00-957, at 3 (hereinafter "ATSA Brief") (quoting Christopher Slobogin, *An End To Insanity: Recasting The Role Of Mental Disability In Criminal Cases*, 86 Va. L. Rev. 1199, 1238 (2000) ("[A]s Morse and others have shown, even the most severely crazy people usually intend their acts and therefore have some control of them").

Indeed, many—if not most—diagnoses in the DSM-IV would fail to satisfy a "cannot control" test. *See, e.g., DSM-IV* at xxiii ("the fact that an individual's presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder. Even when diminished control over one's behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.").

Although respondent's *amici* grudgingly acknowledge that proving the presence or absence of volitional control is

problematic,[6] they do not even attempt to address cases like Ted Bundy or Jeffrey Dahmer. That is a telling omission.

Volitional impairment is a feature of many mental problems and disorders, but even the most troubled people are rational and calculating, at least some of the time, if not much of the time. Indeed, some heinous sex offenders—like Bundy and Dahmer—certainly did not have complete "inability to control" their murderous behavior. Rather, they were quite cunning and calculating, and both of them managed to avoid detection and prosecution for some time. Thus, held to the Kansas Supreme Court's "cannot control" standard, it is likely that a state could not prove that even offenders such as those two should be subject to involuntary civil commitment for residential care and treatment.

D. Personality Disorders May Be Characterized By Lack Of Volitional Control

Even assuming the Court were to require some showing of volitional impairment as a prerequisite to involuntary civil commitment, *Hendricks* does not dictate an utter or total lack of control standard. Rather, the Court in *Hendricks* recognized that "[t]hose persons committed under the Act are, by definition, suffering from a 'mental abnormality' or a '*personality disorder*' that prevents them from exercising *adequate* control over their own behavior." 521 U.S. at 362 (emphasis added).

As explained in the State's opening brief, some personality disorders (including antisocial personality disorder), are

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[6] *See* Brief of the American Psychiatric Association, at 10 (acknowledging that "volitional impairment in general has not been subject to measurement or calibration across the spectrum of human behavior"); *id.* at 26-27 (same point, and also acknowledging that the APA has supported abandonment of volitional control notions in the context of the insanity defense).

characterized in some cases by impulsiveness and lack of control. *See* Brief of Kansas, at 20-24. The DSM-IV observes that "[i]ndividuals with these [personality] disorders often appear dramatic, emotional, or erratic. *DSM-IV*, at 630. Furthermore, the very first diagnostic criterion that DSM-IV sets out for personality disorders in general is as follows:

> A. An enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture. This pattern is manifested in two (or more) of the following areas:
>
> (1) cognition (*i.e.*, ways of perceiving and interpreting self, other people, and events)
>
> (2) affectivity (*i.e.*, the range, intensity, liability, and appropriateness of emotional response)
>
> (3) interpersonal functioning
>
> (4) *impulse control*

DSM-IV, at 633 (emphasis added).

In discussing Antisocial Personality Disorder in particular, the DSM-IV observes that

> Persons with this disorder disregard the wishes, rights, or feelings of others. They are frequently deceitful and manipulative in order to gain personal profit or pleasure (e.g., to obtain money, sex, or power). They may repeatedly lie, use an alias, con others, or malinger. *A pattern of impulsivity may be manifested by a failure to plan ahead.* Decisions are made on the spur of the moment, without forethought, and without consideration for the consequences to self or others . . . .

DSM-IV, at 646 (emphasis added). Indeed, the diagnostic criteria for this disorder include, as one of seven possibilities, "impulsivity or failure to plan ahead." *Id.* at 650.

Lastly, as also described in the State's opening brief, *id.* at 5, there is evidence in this case that respondent suffers at least some lack of volitional control, although not utter lack of control. Dr. Mabugat, the psychiatrist who evaluated respondent for purposes of this proceeding, was asked whether respondent "can't control his behavior, or won't control his behavior." J.A. 51. He responded unambiguously that "it's a combination thereof." *Id.* Thus, there is mental health evidence in this record indicating that respondent lacks at least some volitional control and also demonstrating that personality disorders can, at least in some cases, be characterized by such a lack of control.

II. THIS COURT ALREADY HAS REJECTED THE CONTENTION THAT THE KANSAS LAW IS RETRIBUTIVE, PUNITIVE OR CRIMINAL

In *Kansas v. Hendricks*, this Court unequivocally rejected the *ex post facto* and double jeopardy challenges to the Kansas law, concluding that the law is a legitimate effort to provide care and treatment to dangerous, mentally disturbed sex offenders. Respondent and his *amici* now attempt to persuade the Court to reconsider that holding, but this Court should reject the invitation for two reasons.

First, respondent filed his own petition for a writ of *certiorari* in this case, raising an *ex post facto*/punishment challenge. This Court denied review of that petition, and the question presented by the State's petition does not fairly encompass such issues.

Second, respondent and his *amici* miss the mark on the merits. The Kansas law is not retributive or punitive simply because treatment may be more or less effective with some sex offenders than with others. Nor is the law retributive or

punitive because some offenders subject to it may have some—or even considerable—ability to control their criminal behavior. Indeed, if those were the tests, the law is not retributive as applied to Crane. Crane himself appears to acknowledge benefitting substantially from the treatment he has received in the Kansas program, and apparently admits that the mental health *treatment* he has received has helped him *learn to control* his criminal sexual behavior.[7]

Rather, the important question is whether treatment is a legitimate goal of the Kansas law, *see Seling v. Young*, 531 U.S. 250 (2001), which this Court in *Hendricks* found to be the case. Moreover, Kansas seeks the involuntary commitment of very few of the sex offenders who are being released from prison. For example, Dr. Mabugat—the examining psychiatrist in this case—testified that, although Crane was approximately the tenth sex offender that the doctor evaluated for possible civil commitment, Crane was the first person whom the doctor found to meet the statutory requirements. J.A. 42-44. There is no evidence in the record

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[7] Respondent himself, in an interview he apparently gave shortly after the Court granted *certiorari* in this case, is quoted as praising the Kansas treatment program and acknowledging how it has benefitted him. *See Sexual-predator case has national implications*, Kansas City Star, B-1 (Apr. 10, 2001) ("I'm not hoping that this place [the treatment facility] gets shut down. I think the program is good."); *id.* at B-2 ("As much as I don't want it [this case] to be noteworthy, I want people to know that what I learned here [in the treatment facility] is equally as noteworthy.").

Moreover, the American Psychiatric Association once again, just as it did in the *Hendricks* case, argues that involuntary civil commitment must be limited to a *parens patriae* justification. Brief for the American Psychiatric Association, at 20-22. Even assuming that to be the case, a point which Kansas does not concede, Crane's own statements indicate the value he received from a treatment program in which he would never have engaged but for the Kansas law. Thus, intensive sex offender treatment in the Kansas program is "in the interest of the individual", the standard the APA asserts. *See APA Brief*, at 20-21.

in this case that Kansas or any other state is systematically using a sex offender civil commitment statute for deterrence, punishment or to circumvent the criminal process.

CONCLUSION

Kansas respectfully requests that the Court reverse the decision of the Kansas Supreme Court.

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In the Matter of the Care and Treatment of Michael T. Crane,

State of Kansas,

Petitioner,

v.

Michael T. Crane,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF OF THE STATES OF ILLINOIS, ALABAMA, ARIZONA, CALIFORNIA, DELAWARE, FLORIDA, IOWA, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MISSOURI, NEBRASKA, NEW JERSEY, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, WASHINGTON AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

This case addresses the appropriate substantive due process inquiry in involuntary commitment proceedings against certain violent sex offenders pursuant to state commitment statutes. The Court's resolution of this question will affect the continued commitment of the more than 1200 persons currently committed pursuant to state statutes, and the future operation of those state statutes in furtherance of their stated purpose. As the chief legal officers of the States, the undersigned Attorneys General have a direct and significant interest in the outcome of the case.

SUMMARY OF ARGUMENT

Following the Court's decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997), that the Kansas Sexually Violent Predator Act (the "Act") satisfied constitutional requirements of substantive due process, the Supreme Court of Kansas held, based on the Court's language in *Hendricks*, that the Act violates substantive due process absent a determination that the respondent cannot control his behavior. The "total lack of control" requirement set forth in *In re the Matter of Crane*, 269 Kan. 578, 7 P.2d 285 (2000) is not supported by the language of *Hendricks*, and, if adopted, will severely impede exercise of state statutes enacted to provide for the civil commitment of certain sexually violent offenders.

The state statutes providing for such civil commitments are designed to address the concerns of public safety and treatment for sexually violent persons. This purpose is appropriately served by legislation that provides reasonable solutions to the problem. Historically in the civil commitment context, reasonableness is met

when a statute requires proof of dangerousness and proof of "mental illness" or "mental abnormality." The Court reiterated this requirement in *Hendricks*, but declined to require uniform definitions for terms such as "mental illness" or "mental abnormality, or to impose a different standard for substantive due process on these statutes. The Kansas Act does, indeed, require the proof of dangerousness and the proof of "mental abnormality."

Nothing in the *Hendricks* decision supports the *Crane* court's conclusion that a total lack of volitional control must be proven to support commitment under the Act. In fact, in *Hendricks*, the Court recognizes that it is the lack of adequate control that must result from the "mental abnormality." Either "emotional" or "volitional" impairment can provide the requisite abnormality, as it is the "mental abnormality" (linked with dangerousness) that is the key factor in determining eligibility for commitment under the Act.

ARGUMENT

A "TOTAL LACK OF CONTROL" REQUIREMENT IN THE CIVIL COMMITMENT CONTEXT IS UNWARRANTED AND UNWORKABLE.

A. Introduction

Sixteen states have enacted statutes providing for the involuntary commitment of sexually violent offenders.[1] While the precise language of these statutes varies

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[1] The following states currently have statutes providing for the involuntary commitment of sexually violent offenders: Arizona (A.R.S. § 36-3701), California (Cal Wel & Inst Code (continued...)

somewhat, the purpose behind the laws is uniform: to protect the public from those offenders who pose a continued substantial risk of committing violent sex offenses, until such time as treatment has removed such risk.[2] The purpose of the commitment statutes would be severely compromised by applying a "cannot control" requirement on the standard of proof necessary for

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[1] (...continued)
§ 6600), Florida (Fla. Stat. § 394.910), Illinois (725 ILCS 207/1), Iowa (Iowa Code § 229A.1), Kansas (K.S.A. § 59-29a01), Massachusetts (Mass. Ann. Laws ch. 123A, § 1), Minnesota (Minn. Stat. §§ 253B.185), Missouri (§ 632.480 R.S.Mo.), New Jersey (N.J. Stat. § 30:4-27.25), North Dakota (N.D. Cent. Code, § 25-03.3-01), South Carolina (S.C. Code Ann. § 44-48-100), Texas (Tex. Health & Safety Code § 841.081), Virginia (Va. Code Ann. § 37.1-70.6), Washington (Rev.Code Wash. (ARCW) § 71.09.010, and Wisconsin (Wis. Stat. § 980.01).

[2] *See e.g.* 91st Ill. Gen. Assem., Senate Proceedings, March 3, 2000, at 192 (purpose of proposed Sexually Violent Persons Commitment Act is to address the fact that sex offenders are difficult to rehabilitate and tend to be repeat offenders and protect society from those offenders who pose a continued danger to society by their civil commitment); Iowa Code § 229A.1 (purpose of commitment under the Sexually Violent Predator Act is public safety and treatment of the committed individual); *In re Young*, 122 Wash.2d 1, 10, 857 P.2d 989, 992 (1993) (ultimate goal of sexually violent predator provisions of Community Protection Act of 1990 is treatment and cure, while short-term goal is protection of the community; *Commonwealth v. Bruno*, 432 Mass. 489, 500, 735 N.E.2d 1222, 1231 (2000) (dual purpose of the statute is protection of the public and treatment and rehabilitation of sexually dangerous persons).

commitment. Such a requirement is both unworkable and unwarranted in the context of a civil commitment statute.

B. A Total Lack of Control Requirement is Not Supported by The Court's Decision in *Kansas v. Hendricks*.

In its decision in *In re the Matter of Crane*, 269 Kan. 578, 7 P.2d 285 (2000), the Supreme Court of Kansas held, "[a] fair reading of the majority opinion in [*Kansas v.] Hendricks* [521 U.S. 346 (1997)] leads us to the inescapable conclusion that commitment under the Act is unconstitutional absent a finding that the defendant cannot control his dangerous behavior." 269 Kan. at 578. The finding was based on the Kansas Court's conclusion that although this Court upheld the Kansas Sexually Violent Predator Act in *Hendricks*, it did not contemplate the constitutionality of definitions within that Act which provided for commitment while requiring less than a complete inability to control behavior. *Id.*

The suggestion by the Supreme Court of Kansas that this Court confined its opinion in *Hendricks* solely to the facts of that case, and desires to interpret every definition in the Kansas statute and the several such state statutes in effect nationwide is unsupported by the language of *Hendricks* and other precedent of the Court. Particularly in the context of civil commitment statutes, the Court has historically deferred to state legislation where the laws reflect reasonable solutions to problems facing the states. *See Heller v. Doe*, 509 U.S. 312, 321 (1993); *Addington v. Texas*, 441 U.S. 418, 431 (1979). In this case, the States that have enacted statutes providing for the involuntary commitment of sexually danger-

ous individuals have done so in efforts to fashion a solution to the parallel problems of public safety and the treatment of sexually dangerous offenders. The lower court's holding in *Crane* turns the due process requirement that States make reasonable legislative judgments into an obstacle for the States in doing just that. By making the statutory definition in the Kansas Act (and those similarly fashioned statutes in other States) unattainable in practice, the *Crane* court impedes the States' exercise of their assigned powers. The commitment statutes of the various states share common definitions, and all satisfy the minimum standards of constitutionality.

The Court's decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997), does not hold otherwise. In upholding Kansas' Sexually Violent Predator Act, the Court reiterated the reasoning set forth in other cases involving civil commitment statutes, and held that the key requirement of such statutes is a link between a proof of dangerousness and proof of another factor such as "mental illness" or "mental abnormality." 521 U.S. at 358. *See, e.g., Seling v. Young*, 531 U.S. 250 (2001); *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992); *Addington,* 441 U.S. at 425-426. The Kansas Act and the other similar state statutes require a mental disorder which affects a person's ability to control his dangerousness. The disorder predisposes the person to commit dangerous acts. Due process does not require the State to demonstrate that a person's actions are a result of an uncontrollable impulse caused by the disorder. The language of *Hendricks* requires only the nexus between the disorder and the acts.

The Court further noted, "Indeed, we have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather,

we have traditionally left to legislatures the task of defining terms of a medical nature that have legal significance." *Hendricks*, 521 U.S. at 359. The terms "emotional" and "volitional," as used in Kansas' statutory definition of "mental abnormality" and in similar definitions in other state statutes,[3] are merely different words used to describe a single aspect of the overall condition that constitutes "mental abnormality," which when linked with proof of dangerousness, meets the criteria reiterated by the Court in *Hendricks*. Indeed, in *Hendricks*, the Court acknowledges that the mental abnormality may result in an inability to control, difficulty in controlling, or prevent the exercise of "adequate control" over the harmful behavior. *Hendricks*, 521 U.S. at 357, 358, 362. This language implies that something less than a complete inability to control the harmful behavior is sufficient for constitutional purposes.[4]

---

[3] The use of the terms "emotional" and "volitional" as alternatives is not unique to the Kansas definition of "mental abnormality". For example, in Illinois, the definition of "mental disorder" includes "emotional capacity" and "volitional capacity" as alternatives. 725 ILCS §207/5(b). *See also*, Fla. Stat. § 394.912(5) (including "emotional" and "volitional" as alternatives; ARCW 71.09.020(2) (Washington) (defining "mental abnormality" with alternative capacities); Mass. Ann. Laws ch. 123A § 1 (using alternatives of "emotional" and "volitional" capacity in the definition of "mental abnormality); N.J. Stat. § 30:4-27.26 (defining "mental abnormality" with alternatives of "emotional capacity", "volitional capacity", and "cognitive capacity").

[4] Indeed, although the Court later used the phrase "unable to control" when referring to Mr. Hendricks' condition (521

(continued...)

The Court of Appeals of Washington so construed the Court's language in *Hendricks*:

> In interpreting the Kansas statute, the Supreme Court found that the statutory requirements limited "involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." [citation omitted] The Court did not require, as [Appellant] asserts, a showing of a total lack of control. Rather, the person's mental abnormality or personality disorder must make it "difficult, if not impossible, for the person to control his dangerous behavior." [citation omitted]

In re the Detention of Brooks, 94 Wash. App. 716, 729, 973 P.2d 486 (1st Div. 1999).

Because the statutory language used by the Kansas legislature meets minimum constitutional standards, the requirement that there be a finding of a total lack of control, as stated by the court below in *Crane*, is unwarranted. Imposition of such a standard on the States by the Court, then, would be contrary to the Court's established precedent.

The definition found in the Kansas statute furthers the purpose of the Kansas Sexual Predator Act and similar acts in the various States. As stated above, the purpose of the several statutes permitting involuntary commit-

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[4] (...continued)
U.S. at 364), that language must be read as relating to the preceding references to difficulties in exerting adequate control over the dangerous behavior, rather than as a complete inability to control the behavior.

ment of sexually violent offenders is the protection of the public and the treatment of the sexually dangerous. The States respectfully suggest that this purpose is, indeed, served by a definition of "mental abnormality" or "mental disorder" that recognizes the variety of ways in which a lack of control over one's actions may be manifested. The focus by the Supreme Court of Kansas on impairment which leads to a total lack of volitional control ignores equally compelling emotional or cognitive impairments which might result in a significant lack of control over one's actions.

As the New Jersey appellate court recently reasoned, the inclusion of emotional and even cognitive impairments as alternative abnormalities to volitional impairment, does not nullify the statute in the wake of the *Hendricks* decision. *In re the Matter of W.Z.*, 2001 N.J. Super LEXIS 172, *25-26. Instead, inclusion of additional types of impairments in the statutory definitions serves the purpose of the statute by permitting application of the statute to persons who, due to their disorder, will not control their behavior and are, therefore, dangerous. This can result from one or more of several legitimate impairments. Again, the State need not prove that a person's actions are the result of some uncontrollable urge; the relationship between the disorder and the acts is what must be shown. *Hendricks*, 521 U.S. at 358.

Application of the total lack of control standard enunciated by the Supreme Court of Kansas in *Crane* would essentially render meaningless a significant portion of the definitions of "mental disorder," "mental abnormality," and the like included in the statutes throughout the States. The New Jersey appellate court noted this as well:

> [T]he effect of the quoted passage in *In re Crane* is to nullify language intentionally written into the statute by the state legislature. In New Jersey, we must avoid statutory construction which renders part of a statute "inoperative, superfluous or meaningless." [Citation omitted].

W.Z., 2001 N.J. Super. LEXIS 172, * 28. The latitude which states have historically been granted regarding civil commitment standards encompasses the definitions included in the Kansas statute and those similar statutes in other States. See, *Hendricks*, 521 U.S. at 359.

C. The Impact of A Total Lack of Control Standard on the States Will Be Significant.

The imposition of a total lack of control standard will have a significant impact on the States with statutes providing for civil commitment of certain sex offenders. To date, more than 1200 persons have been committed in the eighteen States that have statutes akin to the Kansas Sexually Violent Predator Act.[5] Each of these offenders is potentially affected by the decision in this case. More certainly, the future use of the commitment statutes will be abrogated by the adoption of a "cannot control" standard. Because the burden of demonstrating

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[5] This figure represents reports received from only thirteen states. The following statistics regarding current commitments were reported to undersigned counsel pursuant to a request: Arizona - 71; California - 270; Florida - 33; Illinois - 78; Iowa - 17; Kansas - 65; Minnesota - 182; Missouri - 15; New Jersey - 136; North Dakota - 9; South Carolina - 38; Washington - 84; Wisconsin - 213.

a total lack of volitional control in any given offender would be nearly impossible, the States will lose use of a tool with which to implement the goals of community safety and offender treatment and rehabilitation.

A standard requiring a total lack of control disregards an obvious level of control that is inherent in sexual offenders. This control is exhibited by the way in which sex offenders manipulate their environments and create opportunities for offenses. For example, factual scenarios involving pedophiles rarely, if ever, describe an offender who attacks every child he encounters in a given day. Instead, the more common case includes descriptions of the efforts to which the pedophiles went to be in an environment in which they could win the trust of children who could then become their victims. Under the standard suggested in *Crane*, the ability to control the environment and create the opportunity to offend could demonstrate an ability to control behavior that would remove the offender from the reach of the commitment statutes. It is obvious, however, that the statutes were drafted with just such offenders in mind. Application of this standard will frustrate the intent of the several state legislatures.

Implementation of an inability to control standard is fraught with problems. The standard articulated by the Supreme Court of Kansas is in the nature of "irresistible impulse," a requirement which has proved unworkable in the criminal context. Legal and psychiatric commentators agree that whether a person is able to control his impulses—whether an impulse is truly irresistible—is ultimately unknowable:

> [F]amously, we cannot distinguish between irresistible impulses and those impulses simply not resisted. . . . [T]he studies do not address and folk psychology does not know whether and to what degree people are unable to refrain from acting. Neither in psychology, philosophy, nor folk psychology is there a reasonable uncontroversial understanding of these matters.

Stephen J. Morse, *Causation, Compulsion, and Involuntariness*, 22 Bull. Am. Acad. Psychiatry Law 159, 177 (1994).

> There is, in short, no objective basis for distinguishing between offenders who were undeterrable and those who were merely undeterred, between the impulse that is irresistible and the impulse not resisted, or between substantial impairment of capacity and some lesser impairment. Whatever the precise terms of the volitional test, the question is unanswerable—or can be answered only by "moral guesses."

H. Rep. No. 98-1030, 98th Cong., 1st Sess. (1983) at 226-27, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3408-09 (*quoting* Professor Richard J. Bonnie).

> No test is available to distinguish between those who cannot and those who will not conform to legal requirements. The result is an invitation to semantic jousting, metaphysical speculation and intuitive moral judgments masked as factual determinations.

Id. (*quoting* Professor Paul H. Robinson). The volitional test for criminal insanity has proven nearly impossible

to implement and has, therefore, been largely abandoned in the criminal context. Implementation of a similar standard in the context of civil commitment laws would appear similarly futile.

Adoption of a complete lack of control standard would significantly impair the legitimate and substantial interests of those states with sexually violent predator acts. The Kansas Act, and the similar statutes in other states, were adopted in order to provide sexually violent predators with long-term, sex-offender-specific treatment in a secure facility while, at the same time, protecting society from their actions. With those irrefutably compelling goals in mind, the undersigned states submit that the *Crane* court's reading of *Hendricks* is contrary to the stated legislatures in enacting commitment laws for the custody, care and treatment of sexually violent predators. Thus, the *Crane* court's complete lack of control standard should be rejected by this Court.

CONCLUSION

For the foregoing reasons, the *amici* States respectfully urge the Court to reverse the lower-court decision.

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In the Supreme Court of the United States

STATE OF KANSAS

Petitioner,

v.

MICHAEL T. CRANE,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR THE ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR THE ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Association for the Treatment of Sexual Abusers ("ATSA") is a non-profit international organization consisting of more than 2000 professionals who specialize in the research, treatment, assessment, and supervision of sexual abusers. ATSA's membership is drawn from all fifty states and nine foreign countries. The membership includes the most prominent clinicians and researchers in the field. Clinical membership requires an advanced degree in a recognized mental health profession in addition to 2000 hours of experience in evaluating and treating sex offenders. The ATSA Code of Ethics and Standards of Practice is an internationally recognized guide for the evaluation and treatment of sex offenders, and has been referred to by courts as the applicable professional standard. See, *e.g.*, *Turay* v. *Seling*, 108 F. Supp.2d 1148 (W.D. Wash. 2000). ATSA offers a uniquely informed perspective on the current research on and the diagnosis and treatment of sexually violent predators. ATSA's interest in this case is to ensure that the legal standard for the civil commitment of sexual predators is medically and scientifically sound, and that it can be sensibly applied by experts in the field, including ATSA members. ATSA has previously appeared as *amicus curiae* in *Kansas* v. *Hendricks*, 521 U.S. 346 (1997).[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

ATSA does not take a position on the public policy issue of the use of civil commitment for sexual predators. ATSA is

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made any monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of briefs from *amici* have been filed with the Court.

concerned, however, that the Kansas Supreme Court's reasoning in its opinion in this case, if adopted by this Court, would result in a scientifically suspect approach that would be unworkable as a practical matter.

Specifically, the Kansas court's "cannot control" substantive due process standard is untenable. Its first incarnation, the "irresistible impulse" insanity test, has been largely rejected by both the medical and legal professions. Moreover, experts in the field would be unable, as a practical matter, to implement the "cannot control" standard.

ATSA also would like to emphasize that numerous treatments are available for sexual predators. Since *Hendricks*, there have been significant advances in the field, although there remains no "cure" for most patients. Civil commitment, if properly implemented with appropriate treatment provided by trained professionals, can play an important role as one part of a comprehensive response to this difficult medical and public policy issue.

ARGUMENT

I. THE "CANNOT CONTROL" STANDARD IS MEANINGLESS AND UNWORKABLE.

The Kansas Supreme Court, purporting to interpret this Court's decision in *Kansas* v. *Hendricks*, 521 U.S. 346 (1997), held that a state violates federal due process when it commits an individual found beyond a reasonable doubt to be likely to engage in dangerous sexual predation, in the absence of a showing that the individual also "cannot control" his dangerous conduct. *In re the Care and Treatment of Crane*, 7 P.3d 285, 290 (Kan. 2000), cert. granted, 121 S. Ct. 1483 (Apr. 2, 2001). The "cannot control" standard should be rejected, because it is not based on sound medicine or science and is unworkable.

A. The "Cannot Control" Requirement Is Not Based On Sound Medicine Or Science.

It is extremely unlikely that even the most delusional and psychotic people suffer from a complete lack of control. See Christopher Slobogin, *An End To Insanity: Recasting The Role of Mental Disability In Criminal Cases*, 86 VA. L. REV. 1199, 1238 (2000) ("as Morse and others have shown, even the most severely crazy people usually intend their acts and therefore have some control of them"). Virtually no act is involuntary in a literal sense. See, *e.g.*, Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1591 (1994) ("the meaning[] of 'cannot help myself' and 'involuntariness' are not literal"). Thus, current scientific and medical knowledge provides no basis for a "cannot control" standard.[2]

People with mental disorders who commit sexual crimes *intend* to carry out their criminal acts. See Slobogin, *supra*, 86 VA. L. REV. at 1238. Thus, "in virtually all cases where volitional impairment is claimed, the defective will theories fail, and, therefore, a defendant's will may be considered perfectly operative." Carlos M. Pelayo, Comment, *"Give Me a Break! I Could Not Help Myself!"?: Rejecting Volitional Impairment as a Basis for Departure under Federal Sentencing Guidelines Section 5K2.13*, 147 U. PA. L. REV. 729, 750 (1999).

Under the Kansas court's "cannot control" standard a pedophile, for example, could be civilly committed only if professionals predicted, among other things, that he would sexually assault a child even if that child was standing next to a policeman. Anything less would indicate that the pedophile

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[2] In determining the appropriate standard for civil commitment, this Court has considered not only scientific knowledge but also reasonable legislative policy judgments. See *Jones* v. *United States*, 463 U.S. 354, 365 n.13 (1983); *Leland* v. *Oregon*, 343 U.S. 790, 801 (1952). This brief focuses on the medical and scientific aspects of the "cannot control" standard to provide additional context to the issues the Court must decide.

has sufficient control to avoid his paraphilic behavior. ATSA is unaware of any offender who suffers from a paraphilia who does not possess at least that degree of self control.

In fact, the Kansas court's "cannot control" substantive due process requirement for civil commitment harkens back to the widely criticized "irresistible impulse" test for mental illness.[3] Both the legal and medical professions have rejected that standard, essentially because both recognize that it is scientifically suspect and unworkable as a practical matter. See, *e.g.*, *Wade* v. *United States*, 426 F.2d 64, 67 (9th Cir. 1970) (irresistible impulse test has "induced widespread criticism * * * by prestigious bar and medical groups, medicolegal scholars, and state courts") (citations omitted); *United States* v. *Freeman*, 357 F.2d 606, 620-621 (2d Cir. 1966) ("the irresistible impulse test [is] inherently inadequate and unsatisfactory. Psychiatrists have long questioned whether 'irresistible impulses' actually exist * * * and [the test] carries the misleading implication that a crime impulsively committed must have been perpetrated in a sudden and explosive fit"); see also Stephen J. Morse, *Crazy Reasons*, 10 J. CONTEMP. LEGAL ISSUES 189, 224 (1999) (American Psychiatric Association and American Bar Association recommended abolishing irresistible impulse test). The "cannot control" standard suffers from the same infirmities.

In 1982, the American Psychiatric Association ("APA") acknowledged a lack of consensus among psychiatrists regarding the role of volition in human conduct and warned against its use in legal proceedings:

[3] The standard is popularly characterized as the "policeman at the elbow" test because offenders would be found insane only if they would have committed their offenses in the presence of an officer. See, *e.g.*, *United States* v. *Kunak*, 17 C.M.R. 346, 357-358 (1954).

> The line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk * * *. The concept of volition is the subject of some disagreement among psychiatrists. Many psychiatrists therefore believe that psychiatric testimony (particularly that of a conclusory nature) about volition is more likely to produce confusion for jurors than is psychiatric testimony relevant to a defendant's appreciation or understanding.

American Psychiatric Association, Statement on the Insanity Defense 11 (1982) *reprinted in* PSYCHOLOGICAL EVALUATIONS FOR THE COURTS 200 (2d ed. 1997) (hereinafter "APA Statement").

Two years later, the American Medical Association ("AMA") went one step further, explaining that the medical profession could not determine whether people lack complete volitional control over their actions, and advised the legal community against adopting the "irresistible impulse" test as the standard for legal insanity. According to the AMA, that insanity defense impermissibly confuses medical and legal concepts in its insistence that a defendant's mental condition deprives him of self-control:

> A defense premised on psychiatric models represents a singularly unsatisfactory, and inherently contradictory approach to the issue of accountability * * *. The essential goal of an exculpatory test for insanity is to identify the point at which a defendant's mental condition has become so impaired that society may confidently conclude that he has lost his free will * * *. *Because free will is an article of faith, rather than a concept that can be explained in medical terms, it is impossible for psychiatrists to determine whether a mental impairment has affected the defendant's capacity for voluntary choice, or caused him to commit the particular act in question.* Accordingly, since

models of mental illness are indeterminant in this respect, they can provide no reliable measure of responsibility.

AMA Board of Trustees, *Insanity Defense in Criminal Trials and Limitations of Psychiatric Testimony*, 251 J.A.M.A. 2967, 2978 (1984) (emphasis added).[4]

Consequently, "it simply is not yet the time to write into the Constitution formulas cast in terms [such as "cannot control"] whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers." *Foucha* v. *Louisiana*, 504 U.S. 71, 96 (1992) (Kennedy, J., dissenting) (citation and internal quotations omitted).

B. The "Cannot Control" Standard Is Unworkable.

This Court should reject the "cannot control" standard for another reason: It is unworkable as a practical matter. As the psychiatric profession explained almost twenty years ago, it is simply impossible to tell the difference between an impulse that is "irresistible" and one that simply is not resisted enough. See APA Statement; see also Morse, *Culpability and Control*, *supra*, at 1657 ("famously, we cannot distinguish between irresistible impulses and those impulses simply not resisted").

Psychologists can use self reporting to gauge a patient's sexual urges. Those self reports are reasonably reliable when used to determine appropriate treatments. In addition, professionals can use personality testing to measure, to some degree, the extent to which a patient can control his impulses.[5]

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[4] Congress agreed in 1984, when it enacted the Insanity Defense Reform Act, 18 U.S.C. § 17(a) (1994), codifying the traditional "defect-of-cognition" test as the exclusive one for federal insanity defenses. See generally Pelayo, *supra*, at 733-735.

[5] Although there have been attempts, such as by penile plethysmography, to measure an individual's sexual arousal in response to visual and auditory stimuli, the reliability and validity of these procedures have "not been well established, and clinical experience suggests that subjects can simulate response by manipulating mental images." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (TEXT REVISION) 567 (4th ed. 2000).

A professional, however, cannot use either of those tests to form a conclusion whether a patient "cannot control" his future behavior.

Professionals also are able to diagnose mental disorders accurately. A diagnosis in itself, however, "does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (TEXT REVISION) xxxiii (4th ed. 2000). And "the fact that an individual's presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder." *Ibid.*

Thus, based on currently available diagnostic techniques, it is difficult to determine whether certain abnormal impulses are any more "irresistible" than normal ones. See also Pelayo, *supra*, at 750–751. If the law is indeed concerned with whether a defendant could control his actions, the law must look beyond current knowledge for assistance in that determination; any such inquiry would have to focus on the defendant's desires, thoughts, and feelings, which are, needless to say, inaccessible by any currently known measuring techniques.

II. TREATMENTS EXIST FOR SEX OFFENDERS.

Although ATSA does not take a position either in favor of or opposed to the use of civil commitment for sexual predators, the organization has established recommendations regarding how states that do choose to enact such laws should implement them. See Association for the Treatment of Sexual Abusers,

Civil Commitment of Sexually Violent Offenders (Mar. 20, 2001), *at* http://www.atsa.com/ppcivilcommit.html. If those recommendations are followed, civil commitment facilities can play an important part in a comprehensive response to sexual predation. Moreover, such facilities may provide treatment for offenders who otherwise would receive none.

Although currently there is no "cure" for sexual predation, treatment programs, many of which have been developed over the last decade by professionals associated with ATSA, can significantly reduce recidivism. See R. Karl Hanson, *et al.*, *First Report of the Collaborative Outcome Data Project On The Effectiveness Of Treatment For Sex Offenders*, 14(2) SEXUAL ABUSE: J. OF RES. & TREATMENT (forthcoming 2002).[6] Although treatment is still a developing field, recent research suggests that it might be effective for high-risk offenders.[7]

Sexual predators are far from a homogenous group of deviants. Each offender has a unique psychic make-up, which includes various "dynamics of physical arousal and distorted emotional needs." B.K. Schwartz, *Effective Treatment for Sex Offenders*, 22 PSYCHIATRIC ANNALS 315, 318 (1992). To

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[6] J.K. Marques, *et al.*, *Effects of Cognitive-Behavioral Treatment on Sex Offender Recidivism*, 21 CRIM. JUST. & BEHAVIOR 28, 28-52 (1994); W.L. Marshall & W.D. Pithers, *A Reconsideration of Treatment Outcome with Sex Offenders*, 21 CRIM. JUST. & BEHAVIOR 10, 10-27 (1994); J.V. Becker & J.A. Hunter, Jr., *Evaluation of Treatment Outcome for Adult Perpetrators of Child Sexual Abuse*, 19 CRIM. JUST. & BEHAVIOR 74 (1992); W.L. Marshall & H.E. Barbaree, "Outcome of Comprehensive Cognitive-Behavioral Treatment Programs," *in* HANDBOOK OF SEXUAL ASSAULT, ch. 21 (W.L. Marshall, *et al.* eds., 1990); W.D. Pithers, "Relapse Prevention with Sexual Aggressors," *in* HANDBOOK OF SEXUAL ASSAULT, ch. 20 (W.L. Marshall *et al.* eds., 1990) and other authorities cited in these sources. G. Hall, *Sex Offender Recidivism Revisited: A Meta-analysis of Recent Treatment Studies*, 63 J. CONSULTING & CLINICAL PSYCHOL. 802-809 (1995).

[7] A. Gordon & T. Nicholaichuk, *Applying the Risk Principle to Sex Offender Treatment*, 8(2) FORUM ON CORRECTIONS RES. 36-38 (1996).

address the range of their emotional deficiencies, psychologists have developed specialized therapeutic interventions specifically tailored to meet the requirements of the individual offenders.

Modern treatment can include psychotherapy or drug therapy, *i.e.*, pharmacotherapy. The psychotherapy component of treatment for sexual deviance can be conducted in several ways, including group therapy, role-playing/role-reversal therapy, covert sensitization (acquiring reactions of repulsion to deviant fantasies and impulses), and cognitive restructuring (confronting denial). See Priest, *et al.*, *Counseling Adult Sex Offenders: Unique Challenges and Treatment Paradigms*, 71 J. OF COUNSELING & DEVEL. 27, 30-31 (1992). The core approach used in many programs is cognitive-behavioral, the goal of which is to enable offenders to understand their behavior, take responsibility for it, motivate them to want to change their conduct, and learn the skills necessary to accomplish that. See Association for the Treatment of Sexual Abusers, *Reducing Sexual Abuse Through Treatment and Intervention with Abusers* (Nov. 6, 1996), *at* http://www.atsa.com/pptreatment.html. Other accepted methods for treating sex offenders include: addressing directly the predator's deviant sexual fantasies, exploring the offender's own possible sexual abuse and recognizing and treating victimization,[8] addressing cognitive distortion, helping the offender develop a plan to interrupt unhealthy patterns and habits that may lead to sexual deviance, and overcoming denial of sexual problems. Schwartz, *supra*, at 317. As of 1992, there

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[8] "A theme common to many dangerous sex offenders is a history of abuse and neglect during their formative years, including sexploitation." L.A. French & J.J. Vollman, Jr., *Treating the Dangerous Sex Offenders: A Clinical/Legal Dilemma*, 31 INT'L J. OF OFFENDER THERAPY & COMPARATIVE CRIMINOLOGY 62 (1987). Psychotherapy addresses underlying issues like past child abuse in the offender's youth in order to enable him to break his current cycle of abuse.

were more than 1200 programs in the United States for treating sexual predators. *Id.* at 318.

There also have been significant advances in the use of drugs for treatment of sexual deviance. Anti-androgen therapy, as part of a comprehensive treatment plan, has been shown to have some success in treating offenders. See Association for the Treatment of Sexual Abusers, *Anti-Androgen Therapy and Surgical Castration* (Feb. 7, 1997) *at* http://www.atsa.com/ppantiandro.html. Cyproterone acetate, for example, has proven effective in controlling deviant sexual fantasies. V.L. Quinsey & C.M. Earl, "The Modifiable Sexual Preference" *in* HANDBOOK OF SEXUAL ASSAULT 279-295 (W.L. Marshall, *et al.* eds., 1990). Psychotropic drugs have been found to be somewhat effective for offenders whose sexual deviance is related to an obsessive-compulsive disorder. E. Coleman, *et al.*, *An Exploratory Study of the Role of Psychotropic Medications in the Treatment of Sex Offenders*, 18 J. OF OFFENDER REHABILITATION 75 (1992).

As the above makes clear, modern psychology offers a host of beneficial treatments for sex offenders. See also W.L. Marshall, *et al.*, *Treatment Outcome with Sex Offenders*, 2 CLINICAL PSYCHOL. REV. 465 (1991) (discussing numerous modern treatment programs); P. Gendreau & R.R. Ross, *Revivification of Rehabilitation: Evidence From the 1980s*, 4 JUST. Q. 349, 381-384 (1987) (same); M.C. Henderson & S.C. Kalichman, *Sexually Deviant Behavior and Schizotypy: A Theoretical Perspective With Supportive Data*, 61 PSYCHIATRIC Q. 273, 273-282 (1990) (same). Even so, psychological knowledge of treatment of sexual deviance is still an evolving field, and all of the dynamics of sexual psychopathology still are not known.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Kansas should be reversed.

Respectfully submitted.

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In The

Supreme Court of the United States

KANSAS,

Petitioner,

v.

MICHAEL T. CRANE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Kansas

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE AMERICAN CIVIL LIBERTIES UNION, AND THE COMMITTEE FOR PUBLIC COUNSEL SERVICES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Fourteenth Amendment's Due Process Clause requires a State to prove that a sexually violent predator "cannot control" his criminal sexual behavior before the State can civilly commit him for residential care and treatment?

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This *amici curiae* brief is submitted in support of Respondent, Michael T. Crane. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief.[1]

INTEREST OF AMICI CURIAE

The National Association of Criminal Defense Lawyers (hereinafter "NACDL") is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide – along with 80 state and local affiliate organizations numbering 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases in the state and federal courts. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice. In furtherance of its objectives NACDL files approximately 35 *amicus curiae* briefs a year in state and federal appeals courts, including at least ten *amicus curiae* briefs in the United States Supreme Court, on a variety of criminal justice issues.

NACDL has a keen interest in the preservation of constitutional rights applicable to criminal prosecutions, and is concerned about the erosion of these safeguards by means of statutes authorizing nominally "civil" incapacitation in place of criminal punishment. NACDL has filed many briefs in cases before this Court involving the relationship between

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[1] As required by Rule 37.6 of this Court, counsel for *amici* submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amici*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

mental health and criminal liability, including one in *Kansas v. Hendricks*, 521 U.S. 346 (1997) arguing that Kansas' Sexually Violent Predator Act (the "Act") imposes punishment in violation of the *Ex Post Facto* and Double Jeopardy Clauses of the Constitution.

The National Legal Aid and Defender Association (NLADA), is a private, non-profit membership organization, founded in 1911. Its membership is comprised of approximately 3,000 offices that provide legal services to poor people, including the majority of public defender offices, coordinated assigned counsel systems and legal services agencies around the nation. The NLADA's primary purpose is to assist in affording effective legal services to people unable to retain counsel, as the Fifth and Sixth Amendment right to counsel enables poor people in our criminal justice system to assert all of their other rights. The NLADA mostly recently has participated as an *amicus curiae* before this Court in support of the petitioner in *Dickerson v. United States*, 530 U.S. 428 (2000).

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, nonpartisan organization with approximately 300,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution. Because the right to be free from arbitrary restraint lies at the very heart of those constitutional guarantees, the ACLU has frequently appeared before this Court, either as direct counsel or as *amicus curiae*, in cases challenging the constitutionality of various civil and criminal commitment schemes. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346 (1997); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *United States v. Salerno*, 481 U.S. 739 (1987); *O'Connor v. Donaldson*, 422 U.S 563 (1975). This case presents another such challenge. Its proper resolution is therefore a matter of significant concern to the ACLU and its members.

The Committee for Public Counsel Services (CPCS) is Massachusetts' public defender agency, created in 1983 to "establish, supervise and maintain a system for the appointment or assignment of counsel" for indigent persons involved in criminal and certain noncriminal judicial proceedings in which the right to counsel has been established. Mass.Gen.Laws c.211D, §5. Among such noncriminal proceedings are those in which the Commonwealth of Massachusetts seeks to commit putatively "sexually dangerous" persons for indeterminate periods of from one day to life. Mass.Gen.Laws c.123A.

The Massachusetts criteria for the commitment of sexually dangerous persons are, in pertinent respects, essentially equivalent to those in effect in Kansas, the subject of this Court's review in the instant action. In upholding Massachusetts' commitment law in a challenge as to its constitutionality, the Massachusetts Supreme Judicial Court, in large part, relied upon this Court's holding in *Kansas v. Hendricks*, 521 U.S. 346 (1997). *Commonwealth v. Bruno,et al*, 432 Mass. 489 (2000). This Court's ruling in the instant action will have a substantial effect upon the substantive rights of the clients served by CPCS and, therefore, CPCS respectfully asserts a special interest therein.

SUMMARY OF ARGUMENT

The Kansas Supreme Court correctly held that the Due Process Clause requires States to circumscribe narrowly the class of sexual offenders subject to indefinite civil confinement so as to make inexorably clear that the true aims of confinement are not punitive. Because the language of Kansas' Sexually Violent Predators Act is sufficiently broad to accomodate punitive aims, the Kansas Supreme Court appropriately required that the jury be instructed that confinement not be allowed absent a finding that the offender had a mental abnormality or personality disorder that rendered him unable to control his violent sexual

impulses. Proof of volitional impairment was previously articulated by this Court in *Kansas v. Hendricks*, 521 U.S. 346 (1997), as a limiting feature of the Act necessary to make it constitutional under the Due Process Clause. The Court also made clear in *Hendricks* that without a showing that the offender was unable to control his criminal proclivities in the future, the Act would be punitive in nature and thereby violate the *Ex Post Facto* Clause of the Constitution in cases where the confinement is based, in part, upon acts that predated passage of the Act.

Civil commitment based upon volitional impairment, or some other equally severe cognitive or emotional disorder that disables a person from engaging in rational decisionmaking or caring for himself, has a long tradition in this country's common law. Kansas may not eschew this requirement under this Court's repeated admonitions that the maximum curtailment of liberty associated with civil confinement may only be imposed in the "narrow" circumstances described by this common law tradition.

ARGUMENT

The State of Kansas argues that the Constitution permits it to continue indefinitely the confinement of any sexual offender nearing the completion of his criminal sentence upon a showing that the offender has a personality disorder and is likely to reoffend in the future. Pet. Br. at 23. As illustrated by the facts of this case, that standard permits a state to obtain civil commitment merely by showing that the offender is an ordinary recidivist who is otherwise a proper target for criminal penalties.

The mental health professionals who testified in this case found Mr. Crane was likely to engage in violent sexual acts in the future because he has committed sex crimes in the past. Pet. Br. at 4, 5, 6 (describing testimony and conclusions of state experts); *see also* Tr. at 447. And, they testified that he exhibited a personality disorder because his

past criminal acts demonstrated a "pervasive pattern of disregard for and violation of the rights of others" insofar as he "fail[ed] to conform to social norms with respect to lawful behaviors," and manifested "aggressiveness." Pet. App. 10a. These characteristics are equally applicable to any person who has committed more than one violent crime. See Pet. App. 11a (describing testimony that more than 75% of prison inmates suffer from antisocial personality disorder).[2] The state's expert witnesses offered no meaningful basis to distinguish Mr. Crane from any other sexual offender who has committed multiple sexual offenses.

Kansas may be correct as a policy matter that violent sexual offenders who repeatedly violate the law should be incarcerated to prevent further harm to others. It is surely free to use its police power to enact harsh criminal punishments on recidivists in order to ensure they are incapacitated for as long as they may remain a danger to society. But any decision to punish persons for recidivist criminal histories must abide by the constitutional limitations that accompany the decision of a state to impose punishment. By permitting states to achieve lifelong incapacitation of virtually any repeat sexual offender through the mechanism of overly broad and malleable civil commitment standards, this Court would render the Constitution ineffectual in preventing states from masking punitive aims in individual

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[2] *See also* Stephen D. Hart, Robert D. Hare & Timothy J. Harpur, *The Psychopathy Checklist – Revised (PCL-R): An Overview for Researchers and Clinicians* in 8 *Advances in Psychological Assessment* 103, 105 (J. Rosen & P. McReynolds eds. 1991) (75-80% of criminals are diagnosable with antisocial personality disorder); James S. Wulach, *Diagnosing the DSM-III Antisocial Personality Disorder*, 14 Prof. Psychol.: Res & Prac. 330 (1983) (75-80%); Romero & Williams, *Recidivism Among Convicted Sex Offenders: A 10 Year Follow Up Study*, 49(1) Federal Probation (USAO 1985) (70% of all sexual offenders have a personality disorder).

commitment cases and thereby avoiding time honored limits on their power to impose punishment.

I. THE DUE PROCESS CLAUSE PROHIBITS INDEFINITE CONFINEMENT OF A PREVIOUSLY PUNISHED SEX OFFENDER WHO IS LIKELY TO REOFFEND WITHOUT A SHOWING THAT THE OFFENDER IS UNABLE TO CONTROL HIS PROPENSITY TO ENGAGE IN FUTURE CRIMINAL BEHAVIOR

This Court has had numerous opportunities to review the various efforts of state legislatures to redress the problem of psychologically impaired offenders who repeatedly commit sexual crimes. *See Seling v. Young*, 531 U.S. 250 (2001); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Allen v. Illinois*, 478 U.S. 364 (1986); *Humphrey v. Cady*, 405 U.S. 504 (1972); *Specht v. Patterson*, 386 U.S. 605 (1967); *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940). The sampling of cases that have reached this Court illustrate the wide variety of different approaches crafted by the states in that regard. For instance, some states have permitted commitment of mentally impaired sexual offenders for treatment in lieu of a criminal prosecution altogether, *see, e.g., Allen*, *Humphrey* and *Pearson*, *supra*, whereas others have permitted commitment following conviction of a crime as an alternative to a criminal sentence in order to provide treatment, *see, e.g., Specht, Humphrey*, *supra,* while more recent statutes authorize commitment of such offenders after they have been convicted of and served their entire sentences for sex offenses, yet strongly suggest that such confinement is not motivated primarily or at all by a desire to treat these individuals, *see, e.g., Hendricks*, *Seling, supra*.

A common feature in this Court's review of the various constitutional challenges that have been mounted against

each of these commitment schemes is its unwavering insistence that Due Process imposes meaningful limits on the ability of States to define broadly the class of persons subject to indefinite civil confinement. These limits are necessary, among other reasons, to assure that the State is acting with a bona fide therapeutic or other permissible civil motive and is not using civil law to mask a punitive purpose and thereby circumvent constitutional limits on its ability to use the criminal law to punish repeat sexual offenders.

In this case, the Kansas Supreme Court held that the instructions to the jury setting forth the standards for civil confinement under Kansas' Sexually Violent Predator Act violated the Due Process Clause as interpreted by this Court in *Kansas v. Hendricks*. Specifically, it held that the Due Process Clause entitled Mr. Crane to a jury determination that he lacked the ability to control his dangerous sexual impulses. Pet. App. 12a. The Kansas Supreme Court correctly stated and applied the law of *Hendricks*. Unless the law is limited to those who are unable to control their criminal sexual proclivities, the Act provides no clear standards by which the class of civil committees could be distinguished from pure recidivists. Under our Constitution, only the criminal law can be used to deter or exact retribution against recidivists who do not suffer from a mental condition that significantly impairs their behavioral controls. The criminal law is perfectly adequate for those purposes.

As interpreted by the Attorney General, the Act gives Kansas the ability to target for additional confinement particular offenders who are fully capable of conforming their future behavior to the law, but for whom the state believes the criminal system – for whatever reason – produced an insufficiently long punishment. Permitting Kansas the unchecked discretion to use its civil commitment statutes to punish sexual offenders for future dangerousness measured by a demonstrated unwillingness, rather than

inability, to obey the law offends the Constitution and a long history of cases decided by this Court.

A. In *Kansas v. Hendricks*, Lack of Volitional Control Was A Necessary Component of the Court's Holding that Kansas' Sexually Violent Predator Act Satisfies Substantive Due Process

In *Hendricks*, this Court reversed a judgment of the Kansas Supreme Court that had invalidated the Sexually Violent Predator Act as a violation of substantive due process. The Court unanimously held that the Act's coverage of persons who suffered from a "mental abnormality" satisfied the "narrow circumstances" in which "forcible civil detainment" is constitutionally permissible, so long as it applies to the "limited subclass" of "people who are unable to control their behavior and who thereby pose a danger to the public health and safety." 521 U.S. at 357. *See also id.* at 375 (Breyer dissenting in part) (no violation of substantive due process, because "Hendrick's abnormality does not consist simply of a long course of antisocial behavior, but rather it includes a specific, serious, and highly unusual inability to control his actions").

There can be no doubt that it was necessary to the due process holding of the Court that statutes authorizing involuntary detainment beyond a determinate criminal sentence already served must be narrowly circumscribed to target only those mentally abnormal individuals for which the criminal system is functionally ill suited to address their problematic behavior. In *Hendricks*, the Court found a sufficient narrowing principle in a requirement that the sexual offender be unable to control his criminal sexual impulses, without foreclosing the possibility that other limiting principles might also satisfy Due Process.

The paragraph stating the majority's due process holding in *Hendricks* makes inescapably clear that the Court's understanding that the Act was limited to those with

impaired volitional control provided the sort of "added statutory requirement" necessary to save the Act from constitutional infirmity. The Court began by acknowledging that a state cannot constitutionally incapacitate a person indefinitely on "[a] finding of dangerousness, standing alone." *Id.*at 358. Due process requires "proof of some additional factor, such as a 'mental illness' or 'mental abnormality,'" that "limit[s] involuntary civil confinement to *those who suffer from a volitional impairment rendering them dangerous beyond their control*." *Id.* (emphasis added). The Court then articulated its understanding that the Kansas Act required proof of the "existence of a 'mental abnormality' or 'personality disorder' that makes it difficult, if not impossible, for the person to control his dangerous behavior." *Id.*

Because the "precommitment requirement of a 'mental abnormality' . . .narrows the class of persons eligible for confinement to those who are unable to control their dangerousness," *id.* at 358, the Court held that Due Process did not require the state to restrict coverage of the statute further to only those who demonstrate a "mental illness." *Id.* at 359. The Court reasoned that it was not the "nomenclature" of mental illness *per se* that had operated in the past to make civil commitment statutes constitutional, but rather it was "[the] criteria relating to an individual's inability to control his dangerousness." *Id.* at 360. Simply put, only if Kansas proved *both* the existence of a mental condition – which state legislatures have broad discretion to define – *and* a resulting failure of self-control was due process satisfied.

The Court articulated a logical reason for finding the Act constitutional only if its reach was limited to those who lack an ability to control dangerous behavior. It is only when a prediction of future dangerousness is "coupled" with a "lack of volitional control" that the potential committee may be "distinguishe[d]" from "other dangerous persons who are perhaps more properly dealt with exclusively through

criminal proceedings." *Id.* A person who lacks the ability to conform his behavior to societal norms due to a personality disorder will not be deterred by the prospect of lengthy prison sentences and, it might be argued, is less deserving of retributive sanctions inasmuch as he is less morally culpable for the actions he takes. On the other hand, one who both appreciates the wrongfulness of criminal conduct and is mentally and emotionally capable of restraining himself from engaging in such conduct is precisely the target of the criminal law.

The criminal law is, in theory, capable of protecting the public by either deterring the recidivist offender with volitional control, or absent deterrence, imposing prison sentences sufficient in duration to incapacitate the offender for as long as necessary to protect the public. The *Hendricks* Court recognized, however, that states may not wish to use the penal system to incapacitate indefinitely offenders who are likely to repeat their crimes but who cannot control their criminal inclinations. State legislators could rationally believe that a lifetime penal sentence is inappropriate for this class of offenders given the reduced deterrent effect on such persons and the disproportionate retribution that may be perceived by imposing a lengthy criminal sentence on someone who could not, for organic or acquired psychological reasons, suppress behavior he knows to be wrong. On the other hand, traditional civil commitment schemes may not be adequate to capture these offenders, insofar as those statutes are often directed at persons whose mental illness prevents them from forming criminal intent at all, makes them incompetent to stand trial or disables them from caring for themselves. The *Hendricks* Court therefore read the Constitution to permit states to use the more flexible constitutional measures for civil confinement in cases like *Hendricks* – where civil and criminal confinement might be used productively in tandem – so long as they target selectively an identifiable class of persons for whom

exclusive use of the criminal justice system could not achieve the state's aims.

This reasoning in *Hendricks* followed directly from this Court's decision in *Foucha v. Louisiana*, 504 U.S. 71 (1992). In *Foucha*, the Court upheld a substantive due process challenge to a civil confinement law that permitted continued confinement of a person who had been found not guilty by reason of insanity after the detainee had regained his sanity and could no longer be classified as mentally ill. The State argued that Foucha's "antisocial personality [] as evidenced by his conduct at the facility" justified continued confinement because it rendered him a danger to himself or others. *Id.* at 78. The Court refused to accept this showing as a basis for civil confinement that satisfied Due Process (*id.* at 82-83):

> If Foucha committed criminal acts [while committed to a psychiatric hospital], such as assault, the State does not explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct. These are normal means of dealing with patterns of criminal conduct.
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> * * *
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> Here, in contrast, the State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct . . . he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term. It would only be a step

> away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.

Like Louisiana in *Foucha*, Kansas has adopted an overly broad category of potential subjects for indefinite civil confinement, which improperly sweeps within its reach persons who are appropriate targets for the criminal justice system. Without a more conscientious tailoring of its civil commitment scheme, Kansas could use the vehicle of civil commitment to impose or extend criminal punishment.

B. Adopting Kansas' Position In This Case Would Undermine A Critical Basis For the Majority's Disposition of the *Ex Post Facto* Challenges In *Hendricks*

Having found that the Act, so limited, did not violate substantive due process, the Court in *Hendricks* then addressed respondent's claim that his confinement violated the Double Jeopardy and *Ex Post Facto* Clauses of the Constitution. Hendricks argued that his confinement under the Sexually Violent Predators Act constituted successive punishment for crimes for which he had already served his sentence. Four justices held that the confinement of Hendricks violated the *Ex Post Facto* Clause because its application was reasonably considered punitive in light of the apparent sham of the State's assertion that it was acting for the civil purpose of providing treatment. *Hendricks*, 521 U.S. at 394. The majority, however, disagreed that the stated aims of treatment were a sham.

For the majority, the volitional impairment requirement that the Court read into the Act enabled it to find a legitimate non-punitive aim in the statute and thereby uphold Hendricks' confinement as not "so punitive in purpose or effect as to negate the State's intention to deem it 'civil.'"

Id. at 361 (internal quotations omitted). The Court reached this conclusion, because of its view that the Act could not be intended to function as a deterrent in light of the volitional impairment requirement:

> Those persons committed under the Act are, by definition, suffering from a 'mental abnormality' or a 'personality disorder' that prevents them from exercising adequate control over their own behavior. Such persons are therefore unlikely to be deterred by the threat of confinement.

Id. at 362-63. Likewise, it stated that the duration of the civil confinement demonstrated a non-punitive purpose, because the Act prohibits confinement once the person no longer "suffers from a mental abnormality rendering him unable to control his dangerousness." *Id.* at 364.

At least some members of the five-justice majority would likely have found the Act punitive in nature if Kansas had in *Hendricks* articulated the position it takes now. To be consistent with its legal position here, Kansas must concede that civil commitment under the Act would have a deterrent effect if it applies to those who can control their behavior. But as Justice Kennedy pointed out in his *Hendricks* concurrence, "retribution and general deterrence are reserved for the criminal system alone." *Id.* at 373. Moreover, Kansas would also have to disagree that the duration of the confinement would be cut short by a showing that the offender has regained control over his future actions, as was assumed by the majority in *Hendricks*. So long as Kansas could show that the offender's antisocial personality disorder remained, Kansas believes continuing confinement is appropriate.

Justice Kennedy wrote separately in *Hendricks* to point out the "dangers inherent when a civil confinement law is used in conjunction with the criminal process." *Id.* at 371-72. He warily forecast situations in which the state could use

civil confinement as "a mechanism for retribution or general deterrence" or "to impose punishment after the State makes an improvident plea bargain on the criminal side." *Id.* at 373. Such a concern seems well grounded in light of statistics showing that states do not appear to be utilizing the full range of punishments authorized by the criminal law. Lawrence A. Greenfield, *Sex Offenses and Offenders, An Analysis of Data on Rape and Sexual Assault*, Bureau of Justice Statistics, NCJ-163392, February 1997, at 14, available at http://www.ojp.usdoj.gov/bjs (only 2/3 of convicted rape offenders receive a prison sentence and the average rapist served only half of their 10-year sentences). To the extent state prosecutors enter plea agreements resulting in minimal prison time as a result of budget crunches or the overwhelming press of criminal business or any other reason, it would be improper to permit a state to compensate for its failure to pursue increased criminal sentences by achieving indefinite, punitive confinement under the guise of civil commitment.

Such a concern would be far less likely to come to fruition if the civil confinement statute was limited in its application to (1) those whom the criminal law could not deter and (2) those against whom the state would be less likely to seek the full amount of retribution due to diminished moral culpability. Justice Kennedy voted with the majority because he was convinced that Kansas' Act – with its requirement of volitional impairment – did not target "too imprecise a category to offer a solid basis for concluding that civil detention is justified." *Hendricks*, 521 U.S. at 373. Without a requirement that the mental abnormality or personality disorder serving as the basis for confinement cause a lack of volitional control, any precision in the definition of the category of persons to which the Act applies vanishes.

The Court's recent decision in *Seling v. Young*, 531 U.S. 250 (2001), emphasizes the practical ramifications of the

Court's reliance in *Hendricks* on a volitional impairment requirement to find the Act was not punitive. In *Seling*, the Court held that once a commitment statute is found to be facially civil in its general application, a committee may not mount an *Ex Post Facto* challenge based on punitive conditions of confinement resulting from the particular application of the statute to him. In *Hendricks*, the majority found the Act was not, on its face, punitive because it was limited to those who lacked volitional control. But if Kansas uses the Act to target individuals who can control their impulses, subjects them to punitive confinement conditions and deprives them of access to treatment, those individuals would be unable to mount a constitutional challenge, in light of *Hendricks* and *Seling*, establishing that the Act – as applied to them – was punitive and a violation of the *Ex Post Facto* clause. The majority in *Hendricks* could not have believed it was authorizing Kansas to accomplish its punitive aims through applications flatly inconsistent with the assumptions on which its *Ex Post Facto* holding was based.[3]

C. *Hendricks'* Requirement of a Volitional Impairment For Civil Commitment Is Steeped In The Common Law and This Court's Jurisprudence

English common law provided for the confinement of persons deemed insane and dangerous to the public. Although the common law granted the mentally ill few legal protections, it limited confinement to the duration of the person's lack of control over his or her reason:

> [I]n the case of absolute madmen, as they are not answerable for their actions, they should not be permitted the liberty of acting unless under proper

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[3] It is worth noting that Kansas' civil commitment scheme also fails to pass constitutional muster if characterized as a preventive detention measure, because it lacks the procedural protections and the limited duration required for preventive detention by this Court. *See, e.g., United States v. Salerno*, 481 U.S. 739 (1987).

> control; and, in particular, they ought not to be suffered to go loose, to the terror of the king's subjects. It was the doctrine of our antient [sic] law, that persons deprived of their reason might be confined till they recovered their senses.

4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND at 25 (1769).

During the colonial period in this country, common law provided that anyone could arrest and confine a person deemed "furiously insane" or "dangerous to be permitted to be at large." Albert Deutsch, THE MENTALLY ILL IN AMERICA 419 (2d ed. 1949) (internal quotations omitted). Confinement could continue only for the duration of the person's dangerous condition. *Id.* At common law, lack of volitional control was intricately linked to dangerous mental illness and was a requirement for continuing commitment. In 1689, the records of York County, Virginia describe an order regarding a "madman" named John Stock,

> whoe keepes running about the neighborhood day and night in a sad Distracted Condition to the great Disturbance of the people, therefore for the prevention of his doeing any further Mischeife It is Ordered by the Court that Mr. Robt. Read, High Sherr: doe take Care that the said Stock bee Lade hold of and safely kept in some close Roome, where hee shall not bee suffered to go abroad until hee bee in a better condition to Governe himselfe . . .

Deutsch, *supra* at 43.

Developments in psychiatry in the nineteenth century brought about reform of mental institutions and changes in laws concerning the mentally ill. Around the time of passage of the Fourteenth Amendment, many states passed statutes that established procedural safeguards for persons whom the State or relatives wished to commit to insane asylums. A

newly recognized form of mental illness called "moral insanity" also greatly impacted nineteenth century laws. This form of insanity, considered distinct from "intellectual insanity," was characterized by an uncontrollable impulse to commit particular offenses even though the affected individual was otherwise sane. Francis Wharton, 1 WHARTON AND STILLE'S MEDICAL JURISPRUDENCE 567 (3d ed. 1873).

These developments in the nineteenth century, however, did not significantly alter common law provisions regarding the civil commitment of mentally ill persons. As late as 1880, the Supreme Court of New Hampshire provided the following summary of the common law regarding the arrest of dangerous mentally ill persons:

> [I]t is lawful to seize and restrain any person incapable of controlling his own actions, whose being at large endangers the safety of others. But this is justifiable only when the urgency of the case demands immediate intervention. The right to exercise this summary remedy has its foundation in a reasonable necessity, and ceases with the necessity.

Keleher v. Putnam, 60 N.H. 30, 31 (1880). This statement of late nineteenth century law demonstrates that despite changes in statutory laws and conceptions of mental illness, the common law preserved a requirement of volitional impairment or other extreme cognitive impairment to justify the continuing confinement of dangerous mentally ill individuals.

The twentieth century witnessed the development of the first legislation specifically allowing the civil commitment of dangerous sex offenders. In the late 1930s, many states enacted "sexual psychopath" statutes that provided for the civil commitment of this class of recidivists. Committee on Psychiatry and Law, Group for the Advancement of Psychiatry, PSYCHIATRY AND SEX PSYCHOPATH

LEGISLATION: THE 30S TO THE 80S, Pub. No. 98 at 853 (April 1977). Fueled by widespread publicity of violent sexual offenses, these statutes set forth various criteria for commitment, including an explicit or implied requirement that the committed individual pose a high probability of future risk to the community. *Id.* at 853, 863. To express this requirement, legislatures used language similar to common law provisions regarding confinement of the mentally ill. One commonly used phrase was "[persons who] lack control over their impulses." *Id.* at 863 (internal quotations omitted).

This Court has addressed constitutional challenges to a variety of civil commitment laws with this common law tradition in mind. Most notably, the Court in *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940), upheld a civil commitment law permitting confinement of persons with "psychopathic personalit[ies]" evidenced by a "habitual course of misconduct in sexual matters." *Id.* at 272 & 273. The Court held that the statute was not constitutionally vague because it required proof that the committee demonstrate "an utter lack of power to control [his] sexual impulses." *Id.* at 274 (internal quotations omitted). Although the Minnesota Supreme Court had merely stated that coverage of the statute *included* persons who lacked control, the Court adopted this feature of the statute as mandatory to avoid the constitutional doubt that would be raised if it applied to those outside that definition. *Id.* at 274. Nothing in the Court's decisions since *Pearson* eliminates the constitutional doubt engendered by civil confinement of offenders who are able to exercise rational and emotional control over their behavior.

II. KANSAS HAS NOT OTHERWISE SHOWN A COMPELLING JUSTIFICATION FOR THE MASSIVE CURTAILMENT OF LIBERTY THAT RESULTS FROM ITS CIVIL CONFINEMENT SCHEME

Long before its decision in *Hendricks*, this Court emphasized the principle that the Fourteenth Amendment places stringent limits on the ability of a state to impose the "massive curtailment of liberty," *Humphrey v. Cady*, 405 U.S. 504, 506 & 509 (1972), attendant to indefinite confinement under the rubric of a civil statute. Last Term, the Court stated:

> A statute permitting indefinite detention . . . would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "depriv[e]" any person . . . of . . . liberty . . . without due process of law." Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that Clause protects. And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and "narrow" non-punitive "circumstances," where a special justification such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint."

Zadvydas v. Davis, No. 99-7791, slip. op. at 9-10 (U.S. June 28, 2001) (citations omitted).

No doubt, the Court has permitted an individual's liberty interests to be overcome in various circumstances, but only on a demonstration by the state that civil confinement is specially needed to redress a legitimate, non-punitive aim and that the nature and duration of the confinement is

tailored to that aim. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Foucha*, 504 U.S. at 87-88 (O'Connor concurring) (nature and duration of detention must be "tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness"). Kansas has provided no justification for the breadth and vagueness of the criteria on which it seeks confinement under the Sexually Violent Predators Act, which might otherwise justify its rejection of a volitional control requirement.

The Court has recognized that an individual's liberty may be overcome in cases where there is no indication in the record one way or the other mentioning volitional control, but nonetheless has insisted upon evidence of some other kind of well-defined, severe inability to function, whether deriving from cognitive or emotional impairments. For instance, the Court has approved civil confinement where the state invokes its *parens patriae* powers to incapacitate mentally ill persons who are dangerous to self or others and who are "unable because of emotional disorders to care for themselves." *Addington v. Texas*, 441 U.S. 418, 426 (1979). It has similarly approved commitment of those whose mental illnesses rise to a level of insanity so severe that they are excused from criminal responsibility altogether, *Jones v. United States*, 463 U.S. 354 (1983), so long as the confinement ends if and when when the offender regains sanity. *Foucha, supra.*

Kansas has not made, nor could it make on this record, any comparable showing that its Sexual Predator Act falls within the few "special and narrow non-punitive circumstances," *Zadvydas*, slip. op. at 10, in which the Court has approved indefinite civil confinement. Rather, its position is much more akin to that of the state in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), where the Court rejected the proffered justifications for involuntarily confining for an indefinite period, without treatment, a person adjudged mentally ill but not dangerous. Here, the state wishes to

confine – with a principal motivation of incapacitation, not treatment, *Hendricks*, 521 U.S. at 366 – all sexual offenders who are dangerous, but whose mental abnormalities make them no different than the prison population at large. There is nothing "special" or "narrow" about Kansas' position in this case, and it calls into substantial doubt the basis upon which it asserted in *Hendricks* that its aims were non-punitive.

CONCLUSION

For the foregoing reasons, the decision of the Kansas Supreme Court should be affirmed.

Respectfully submitted,

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Petitioner,
v.
MICHAEL T. CRANE,
Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR THE AMERICAN PSYCHIATRIC ASSOCIATION AND AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

No. 00-957

KANSAS,

Petitioner,

v.

MICHAEL T. CRANE,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR THE AMERICAN PSYCHIATRIC ASSOCIATION AND AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

The American Psychiatric Association (APA), with approximately 42,000 members, is the Nation's leading organization of physicians specializing in psychiatry. The APA has participated in numerous cases involving mental-health issues in this Court, including *Olmstead v. L.C. by Zimring*, 527 U.S. 581 (1999), *Kansas v. Hendricks*, 521 U.S. 346 (1997), *Foucha v. Louisiana*, 504 U.S. 71 (1992), *Washington v. Harper*, 494 U.S. 210 (1990), *Allen v. Illinois*, 478 U.S. 364 (1986), and *Addington v. Texas*, 441 U.S. 418 (1979).[1] The American Academy of Psychiatry and the Law,

[1] No party authored this brief in whole or in part, and no person except *amici* and their members made a monetary contribution to the preparation

an organization of approximately 2500 psychiatrists dedicated to excellence in practice, teaching, and research in forensic psychiatry, has participated as *amicus* in, *e.g.*, *Penry v. Johnson*, 121 S. Ct. 1910 (2001), and *Jaffee v. Redmond*, 518 U.S. 1 (1996). Presenting information about diagnosis, recidivism, treatment, and other issues, the organizations here seek to ensure that psychiatric hospitalization is reserved for proper care and treatment of patients, not used for preventive detention as a substitute for the criminal justice system.

STATEMENT

This case involves the Kansas statute that was at issue in *Kansas v. Hendricks*, 521 U.S. 346 (1997)—the Sexually Violent Predator Act, enacted in 1994. This case, like *Hendricks*, also involves an application of that statute based on acts committed prior to the statute's enactment. Pet. App. 13a. The facts of the two cases, however, are significantly different, requiring the State of Kansas, in the state courts and in this Court, to make a much more sweeping claim of state power to confine individuals for preventive purposes than this Court approved in *Hendricks*.

In 1993, respondent Crane, roughly 31 years old at the time (JA 68), exposed himself at a tanning salon and, half an hour later, committed an attack on a video-store clerk, trying to force her to perform oral sex and stating that he would rape her (then abruptly running off). Pet. App. 2a-3a; *see State v. Crane*, 918 P.2d 1256, 1258-59 (Kan. 1996) (describing evidence). For the first incident, he was convicted of the misdemeanor of lewd and lascivious behavior. Pet. App. 2a; JA 12. For the second incident, he was convicted of several felonies and sentenced to prison for 35 years to life, but those convictions were overturned on appeal in 1996 as jurisdictionally defective based on the State's failure to charge the necessary elements. *Crane*, 918 P.2d at 1258, 1265-69.

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or submission of this brief. S. Ct. R. 37.6. The parties have filed letters giving blanket consent to the filing of *amicus* briefs.

The State, having lost its ability to pursue the original serious charges, entered into a plea agreement with Crane in August 1997. Under the agreement, Crane pled guilty to the lesser offense of aggravated sexual battery. He received a very short sentence, with a conditional release date set for only a few months later, in January 1998, because he had already "served nearly as much time as could be imposed for his conduct." Pet. App. 2a-3a, 15a.

The month before Crane's January 1998 release, the State filed a petition to confine him as a sexually violent predator under the Kansas Act. JA 1; Pet. App. 19a. The trial court, after finding probable cause to believe that Crane qualified as a sexual predator, ordered him sent to the Larned State Security Hospital for evaluation. Pet. App. 22a; Pet. Br. 2-3. In late February, while the evaluation was under way, the trial court rejected Crane's motion for summary judgment and ruled that the State need not "prove the existence of a mental disorder that so impairs the volitional control of [Crane] as to render him unable to control his dangerous behavior," but "must only prove the existence of a mental disorder that makes [him] likely to reoffend." Pet. App. 23a; *id.* (noting Crane's summary-judgment contention that "the State has no evidence he committed any sexual act while his volitional control was impaired by any mental disorder to the degree he was unable to control his dangerous behavior" and stating: "the facts stated in [Crane's] motion are uncontroverted").

On March 2, 1998, two state employees at Larned—Dr. Leonardo Mabugat, a psychiatrist, and Mr. Kenneth Eaves, a psychologist—produced a written evaluation. That evaluation (JA 11-20) was referred to during the subsequent trial (*e.g.*, JA 78) but does not seem to have been admitted into evidence (Pet. Br. 3-4).[2] The authors, however, along with

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[2] The evaluation, as Kansas observes (Pet. Br. 3-4), identified a collection of prior criminal arrests, charges, and convictions (one conviction, from 12 years earlier, was for a sexual offense, *see* JA 12-16);

two other mental-health professionals (Robert Heurter and Douglas Hippe, both psychologists), testified for the State at the subsequent trial.

The testimony relied on the standard diagnostic catalog—the current edition is the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition—Text Revision* (2000) ("*DSM-IV-TR*")—which was described at trial as a tool used to promote uniformity in communicating about "personality, medical problems, social problems, and the like" (JA 105). The State's witnesses asserted that Crane came within two *DSM* categories, exhibitionism and antisocial personality disorder. *See* JA 46-49, 71, 89, 110-16; *DSM-IV-TR* at 569 (exhibitionism: exposure to unsuspecting strangers), 701-06 (antisocial personality disorder: "pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood").[3] Exhibitionism alone would not render Crane

noted Crane's participation in group therapy in prison but not in sex offender treatment (JA 17); stated a diagnosis of exhibitionism and antisocial personality disorder (JA 19); and opined that the antisocial personality disorder "would account for [Crane's] aggression toward women" (JA 19), which "has been sexual in that it has proceeded progressively from his exhibitionistic behavior" (JA 20), and that Crane would be a sexually violent predator under the statute if the list of arrests, charges, and convictions were accurate but would not be if the 1993 video-store attack were considered by itself (JA 20).

[3] The diagnostic criteria—aside from requiring that the person be 18 and have shown comparable misconduct before 15 and not engage in the misconduct only because of schizophrenia or a manic episode—are stated in *DSM-IV-TR* (at 706) as follows (punctuation added). "There is a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following: (1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest; (2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure; (3) impulsivity or failure to

dangerous (JA 94-95, 98, 117), but the antisocial personal disorder diagnosis evidenced by Crane's criminal record—a condition based on "enduring traits . . . that cause enduring trouble, enduring difficulties either with the law or psychologically, personally, or in the community in some way" (JA 111), and "relatively unchangeable" (JA 112), "extremely difficult to treat, very intractable, not likely to change" (JA 118)—made a critical difference in qualifying Crane as a sexual predator under the Kansas statute (JA 52, 118).[4] *See* Pet. App. 3a. The likelihood of re-offending was variously estimated at just barely 50% (JA 67) and 85-90% (JA 121). The State's professional witnesses, without difficulty understanding the concept, testified that, though antisocial personality disorder may affect the ability to control behavior, it does not generally and did not in Crane's case mean an inability to control behavior. JA 56-57, 70, 99.[5] Indeed, Mr. Hippe reported that (in direct contrast to the testimony of Hendricks in the *Hendricks* case) Crane told him that he

plan ahead; (4) irritability and aggressiveness, as indicated by repeated physical fights or assaults; (5) reckless disregard for safety of self or others; (6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations; (7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another."

[4] With respect to the observation (*DSM-IV-TR* at 704) that antisocial personality disorder "may" be less in evidence as an individual ages into the fourth decade and beyond, one witness stated that it was not likely to diminish in Crane's case because the condition was evident in his 30s (JA 76), and another witness noted the "may" in the *DSM* observation and stated that a limited literature merely suggested, but did not substantiate, such mellowing in the 45-55 age range (JA 135-136).

[5] Although Dr. Mabugat, when initially asked by the State if Crane "can't control" or "won't control" his behavior, asserted that "it's a combination" (JA 51)—as the Kansas Supreme Court observed (Pet. App. 10a)—he later agreed that Crane's "disorders do not affect his volitional control to the degree that he cannot control his behavior." JA 70; *see* JA 71-73.

could control his behavior. JA 117. *See also* Pet. App. 24a (denying summary judgment to Crane "even though the State's expert witnesses might agree that [Crane's] mental disorder does not impair his volitional control to the degree he cannot control his dangerous behavior").

In the conference about jury instructions, the State acknowledged that this case was different from the *Hendricks* case. It stated (with overbreadth) that "pedophilia is something that affects a person's volitional control to the point where they cannot control it. This is a completely different situation . . . ." JA 141. Accordingly, the State argued that this Court's *Hendricks* decision was not limited to the particular facts of the case; rather, "the statute, as a whole, is what the Supreme Court addressed in the *Hendricks* case." JA 140.

The instructions given to the jury recited the threshold element of a conviction of a sexually violent offense—which was met, as a matter of law, by the aggravated sexual battery conviction entered against Crane under the plea agreement. JA 156. The instructions then permitted an adverse finding if the jury found that Crane had either a "mental abnormality" or a "personality disorder" that makes him "likely to engage in future predatory acts of sexual violence" if not securely confined, *i.e.*, such acts were "more probable to occur than not to occur." JA 156, 157. The only real question for the jury was this likelihood question, because the jury was told that the "personality disorder" standard was satisfied by any "personality disorder" recognized in *DSM*, such as "antisocial personality disorder" (JA 157)—which applied to Crane, according to the uniform testimony. Though essentially a moot point, the jury was also allowed to find a "mental abnormality"—any condition "affecting the emotional or volitional capacity which predisposes a person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others," with "volition" meaning "act of willing or exercise of the will." JA 156, 157.

The instructions, in short, imposed no requirement whatever of impaired ability to control one's behavior.

On appeal, the Kansas Supreme Court reversed the adverse finding, concluding that the statute could not constitutionally be applied "absent a finding that a defendant suffers from a volitional impairment," and remanded for a new trial. Pet. App. 2a, 2a-20a. The court relied on the fact that this Court's *Hendricks* decision, involving a man who "admitted . . . that he was unable to control the urge" to abuse children sexually (*id.* at 6a, citing *Hendricks*, 521 U.S. at 355, 360), "is replete with references to the commitment of persons who cannot control their own behavior" both in discussing due process (*id.* (citing *Hendricks*, 521 U.S. at 357, 358, 360, 362, 364); *id.* at 6a-8a) and in discussing the non-criminal character of the statute to reject the ex post facto and double jeopardy challenges (*id. at* 12a-13a (citing *Hendricks*, 521 U.S. at 362-63, 364)). The court concluded that the Constitution requires "a finding that the defendant cannot control his dangerous behavior," a finding of "inability to control his behavior." *Id.* at 11a, 12a. The failure to demand such a finding in the jury instructions required reversal and a new trial. *Id.* at 12a, 20a.

INTRODUCTION AND SUMMARY OF ARGUMENT

Individuals who commit sex offenses commonly are criminals who should be held criminally responsible for their willful acts. The State, through its legislature and its prosecutors, should bring to bear its criminal-justice system, with its constitutional limits (*e.g.*, against ex post facto punishment and double jeopardy), to impose appropriately severe punishment on such individuals. What the State should not be permitted to do under the Constitution is to evade the criminal-justice system, when dissatisfied with decisions it has made, by setting up an alternative regime broadly authorizing the indefinite locking up of individuals based on risk of future offenses—outside the *parens-patriae-*

based tradition of medically justified civil commitment for those suffering severe mental illnesses, and in disregard of the tight limits on permitted preventive detention. The State in the present case asks for this Court's approval of just such a broad regime, thereby breaching fundamental limits protecting liberty in our society.

The request should be rejected. The Court has made clear that "'the concept of ordered liberty'" severely limits the circumstances in which a State may deprive people of their physical freedom by imprisoning them—principally as punishment upon a proper criminal conviction. *United States v. Salerno*, 481 U.S. 739, 746 (1987); *see Zadvydas v. Davis*, 121 S. Ct. 2491, 2498-99 (2001). Kansas, not able to justify Crane's confinement as criminal, must bring it within some other principle defining one of the narrow circumstances justifying civil confinement. Kansas, however, has not presented any justification that would not equally justify further preventive detention of a large share of prisoners after they have served their sentences, thus substantially displacing the criminal-justice system.

Mere dangerousness in the sense of likely recidivism has never been enough, as Kansas does not dispute. Where highly certain, imminent, grave harm is not at issue, prediction of reoffense is only a matter of general and uncertain probabilities. Likely recidivism, the best that can be done in circumstances like the present, would not meaningfully limit the class of individuals subject to preventive confinement.

Nor is such limitation supplied by mere applicability of *some* recognized diagnostic category in *DSM* as the source of likely recidivism. The Court in *Hendricks* rejected the notion that constitutional justifications follow either labels ("mental illness" versus, say, "mental abnormality") or *DSM* diagnostic categories, which are designed for purposes other than justifying confinement. Of particular importance here, permitting confinement of all dangerous individuals with

"antisocial personality disorder" (a *DSM* category) not only has effectively been rejected by this Court in *Foucha v. Louisiana*, 504 U.S. 71 (1992), but would, as a factual matter, not meaningfully circumscribe the reach of preventive detention. The constitutionally valid tradition of civil commitment for "harm-threatening mental illness" (*Zadvydas*, 121 S. Ct at 2499) must incorporate a substantive standard for the mental-illness component (by whatever name), beyond mere listing in *DSM*.

One such principle, which reflects the distinctive characteristic of the tradition of civil commitment of the mentally ill (as urged by the APA in *Hendricks*), is that the confinement be a medically justifiable one for the good of the individual, hence an exercise not only of the State's police power (to protect the public against predictable danger) but, also, of the State's *parens patriae* power. Putting aside (what is not at issue here) cases involving severe cognitive impairment or highly certain imminent grave danger, this must mean confinement only for providing available treatment effective enough to hold a realistic promise of release (followed by further treatment in less restrictive settings). Kansas does not rely on any such standard, but instead invokes "treatment" simply in the sense of something a doctor or other professional can do to a person in the hope of changing him—there being no known reliably effective treatments in the sense relevant here, *i.e.*, so reducing recidivism risk as to lead to a determination of safety for release. Such invocation of "treatment," like mere invocation of any *DSM* category, neither furnishes a *parens patriae* medical justification for confinement nor meaning-fully limits the class of offenders subject to confinement, for the evidence of available "treatment" is not meaningfully different for offenders generally.

This Court, in *Hendricks*, pointedly relied on another substantive limiting principle, seizing on the highly unusual fact that Hendricks was dangerous because of a deviant

sexual condition, pedophilia, that he confessed made him unable to control his criminal conduct. That fact both made imminent danger highly certain and made Hendricks an extreme case of inability to control the behavior causing harm—in both respects making Hendricks analogous to a person with a highly contagious disease who presents an imminent danger not traceable to voluntary human action. While volitional impairment in general has not been subject to measurement or calibration across the spectrum of human behavior, *Hendricks* itself establishes both the coherence of the concept and its usefulness in extreme cases. In this case, with neither this limiting principle nor any other having been used as the basis for confinement, the commitment of Crane was properly set aside by the Kansas Supreme Court.

ARGUMENT

THE KANSAS SUPREME COURT'S INVALIDATION OF CRANE'S COMMITMENT SHOULD BE AFFIRMED

This Court's decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997), frames the analysis in this case. That decision pervasively, and pointedly, focuses on the distinctive facts bringing Hendricks's confinement within the narrow circumstances in which the constitutionally protected tradition of ordered liberty permits civil confinement in a secure institution. Kansas, in confining Crane, has repudiated both the *Hendricks* basis for limiting such confinement and any other meaningful limiting principle. For that reason, the Kansas Supreme Court was correct in setting aside, for retrial under more demanding standards, the commitment of respondent Crane under the Kansas Sexually Violent Predator Act.

A. *Kansas v. Hendricks* Relied Centrally On Hendricks's Confessed Inability To Control His Harmful Conduct

The most striking evidence in *Hendricks* was Hendricks's own testimony, as this Court stated, that he "'can't control the urge' to molest children," so that "the only sure way he could keep from sexually abusing children in the future was 'to die.'" 521 U.S. at 355. Kansas, in defending its confinement of Hendricks under its statute, emphasized that testimony in its statement of facts. Pet. Br. 9, 10, 10, 11 in *Hendricks*. Nevertheless, the State did not affirmatively rely on Hendricks's inability to control his conduct as a basis for its argument defending the statute in its briefs as petitioner (on the due process issue) or as cross-respondent (on ex post facto and double jeopardy). *See* Pet. Br. 20-50 in *Hendricks*; Cross-Resp. Br. 3-39 in *Hendricks*; *see id.* at 39-49 (equal protection); *cf.* Pet. Br. 22 in *Hendricks* (quoting the "utter lack of power to control" and "uncontrollable" language characterizing the statute upheld in *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 273 (1940)). In its reply brief on the due process question, however, when offering an explanation of why the class of sex offenders covered by its statute was appropriately narrow, and thus escaped condemnation under the reasoning of *Foucha*, *supra*, the State deemed it "important" that the Kansas statute's limitation to "sexual predation" reasonably targeted "a disturbed mental condition which, if it persists, is likely to lead to irrational *and irresistible* urges to harm additional victims." Reply Br. 9 in *Hendricks* (emphasis added).

This Court, upon deciding the case, seized on that precise feature, made applicable in the Hendricks case by the stark admission of Hendricks himself, and relied on it pervasively in upholding Hendricks's confinement against constitutional challenge. Thus, having described the crucial testimony (521 U.S. at 355), the Court incorporated the inability-to-control principle into its very first paragraph of legal analysis, which

defined why the Kansas statute, as applied to Hendricks, was consistent with the Nation's "understanding of ordered liberty" protected as a matter of substantive due process. *Id.* at 357. Quoting *Foucha* for its affirmation that "freedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause'" (*id.* at 356), along with the recognition of *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905), that the freedom is not absolute, the Court stated the principle that validated the Hendricks confinement: "States have in certain narrow circumstances provided for the forcible civil detainment of people *who are unable to control their behavior* and who thereby post a danger to the public health and safety," "a limited subclass of dangerous persons." *Id.* at 357 (emphasis added).

The Court repeatedly stressed the same critical fact, as its understanding of the Kansas statute, in rejecting the due-process challenge. The Court observed that Kansas's requirements "serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous *beyond their control*." *Id.* at 358 (emphasis added). The Court described the statute as requiring a condition that "makes it difficult, if not impossible, for the person to control his dangerous behavior,"and then stated its understanding that this requirement "narrows the class of persons eligible for confinement to those *who are unable to control* their dangerousness." *Id.* (emphasis added). The Court rejected Hendricks's demand that legal definitions and standards "mirror those advanced by the medical profession." *Id.* at 359.[6] Rather, labels aside, what was critical was that

[6] The APA explained in its *amicus* brief in *Hendricks* (at 22-23 (footnote omitted)): "Just as state legislative dictates cannot control the standard of 'mental illness' justifying involuntary confinement, so, too, the standard cannot be controlled by the categories set forth in [*DSM-IV* (1994) or other classification systems]. Such catalogues include a vast range of disorders that vary widely in severity and type of impairment (*e.g.*, cognitive, mood, sexual, eating, learning, sleep, adjustment, etc.).

the Kansas statute contained substantive criteria like those in earlier laws "relating to an individual's inability to control his dangerousness" (*id.* at 360), that Hendricks himself suffered from the well-recognized "serious mental disorder" of pedophilia (*id.*), and that "Hendricks even conceded that, when he becomes 'stressed out,' he cannot 'control the urge' to molest children." *Id.* It was precisely "[t]his admitted *lack of volitional control*" that, together with dangerousness, "adequately distinguishe[d] Hendricks from other dangerous

The classification schemes are developed and periodically altered, through comprehensive field trials, research, and analysis, to serve diagnostic and statistical functions, forming a common (and always imperfect) language for gathering clinical data and for communication among mental health professionals. *DSM-IV* at xv-xxv. These schemes are designed to identify the full range of mental disorders, each (according to the inevitably imprecise definition)

> a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom.

[*DSM-IV* at xxi.]

"Such comprehensive classification schemes are not restricted to identifying those persons who warrant involuntary treatment, let alone confinement. Nor are they designed to identify those subject to various legal standards, such as those for involuntary confinement. Thus, the authors of *DSM-IV* caution that '[i]n most situations, the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a "mental disorder," "mental disability," "mental disease," or "mental defect."' *DSM-IV* at xxiii. The authors further caution that 'a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder.' *Id.* Not all individuals who come with a *DSM-IV* category suffer an impairment that diminishes their autonomy, much less one justifying involuntary confinement for the individual's own good."

persons who are perhaps more properly dealt with exclusively through criminal proceedings." *Id.* (emphasis added).

The Court relied on the same critical factor in rejecting the ex post facto and double jeopardy challenges. The Court concluded that the Kansas legislature did not intend its statute "to function as a deterrent" (a criminal-law objective) because it targets only persons with a condition "that prevents them from exercising *adequate control over their behavior*," persons who are "unlikely to be deterrred by the threat of confinement." *Id.* at 362-63 (emphasis added). More indirectly, the Court concluded that incapacitation alone *can* be a justified civil objective by invoking an analogy to harm effected other than through voluntary human action—quarantining "persons afflicted with an untreatable, highly contagious disease." *Id.* at 366 (citing *Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. Of Health*, 186 U.S. 380 (1902)).

Justice Kennedy, in his concurrence, noted that the Court's analysis "concerns Hendricks alone." *Id.* at 371.[7] He also warned against such laws' being used to displace the criminal system (*id.* at 372-73), thus echoing the majority's emphasis of the characteristic distinguishing Hendricks from "other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings" (*id.* at 360). Justice Breyer's dissent, noting the wide area of agreement with the majority, stressed the distinctive fact of Hendricks's "specific, serious, and highly unusual inability to control his actions" (*id.* at 375), making his a "classic case of irresistible impulse" (*id.* at 376).

In sum, the Court relied centrally on the circumstances bringing Hendricks's case within a narrow category of

[7] *Hendricks* did not, because it could not, rule on the application of the challenged law to circumstances not presented. Neither a facial validating of a law nor a rejection of a challenge to its application in one circumstances determines the validity of the law in different applications.

nonpunitive civil confinement: Hendricks's highly unusual, confessed inability to stop himself from recommitting serious offenses in highly likely circumstances, thus necessarily and without significant uncertainty presenting a grave near-term threat. It was on that basis that the Court judged the State's interests nonpunitive and sufficiently akin to traditionally justified civil confinement to pass muster against due process, ex post facto, and double jeopardy challenges.

B. Crane Was Committed Under Standards Lacking Any Meaningful Limiting Principle To Distinguish General Preventive Detention Of Offenders

1. This Court has made clear the fundamental, essentially liberty-defining character of freedom from confinement in our system of "ordered liberty." *Hendricks*, 521 U.S. at 357; *Foucha*, 504 U.S. at 80; *Salerno*, 481 U.S. at 746. Based on that recognition, the Court has likewise made clear that due process permits physical restraint in the form of confinement, outside the context of punishment upon criminal conviction, only in "narrow" circumstances—as reiterated just recently in *Zadvydas*, 121 S. Ct. at 2498-99:

> Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, *see United States v. Salerno*, 481 U.S. 739, 746 (1987), or, in certain special and "narrow" non-punitive "circumstances," *Foucha*, *supra*, at 80, where a special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint." *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997).

* * * *

> [W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections. *Compare Hendricks*, *supra*, at 368 (upholding scheme that imposes detention upon "a small segment of particularly dangerous individuals" and provides "strict procedural safeguards") and *Salerno*, *supra*, at 747, 750-752 (in upholding pretrial detention, stressing "stringent time limitations," the fact that detention is reserved for the "most serious of crimes," the requirement of proof of dangerousness by clear and convincing evidence, and the presence of judicial safeguards), with *Foucha*, *supra*, at 81-83 (striking down insanity-related detention system that placed burden on detainee to prove nondangerousness). In cases in which preventive detention is of potentially *indefinite* duration, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger. *See Hendricks*, *supra*, at 358, 368.

For this principle to be meaningful, a State's basis for civil confinement must be deemed insufficiently limiting when it would substantially displace the criminal-justice system by applying to a large share of offenders, confining them indefinitely even after completion of their sentences, or as a substitute for criminal sentencing altogether (if the offense were used merely as evidence of dangerousness). *See Foucha*, 504 U.S. at 76 n.4, 82-83; *cf. Hendricks*, 521 U.S. at 360 *id.* at 372-73 (Kennedy, J., concurring).[8]

2. The State of Kansas does not defend its confinement of Crane based solely on his dangerousness in the sense that he

[8] In the present case, the confinement scheme was used precisely as a means of making up for the State's failure in successfully pressing sufficiently serious criminal charges for the video-store attack. *See* Pet. App. 4a.

is (in the language of the jury instruction) "likely to engage in future predatory acts of sexual violence." JA 156. Critically, this case, unlike some other situations involving "dangerousness" (obviously a matter of degree, in imminence, severity, and certainty), does not involve either an intrinsically short-term confinement (*Salerno*, *supra*) or the sort of highly certain prediction of truly immediate grave danger that might be made, for example, for certain cases of infectious disease (*see Jacobson*, *supra*) or, even, for some extraordinary cases of imminently dangerous mental illness (whether or not meaningfully treatable). Neither in its statute nor in the instructions given to the jury in this case did Kansas undertake to limit its confinement regime to such acute situations (*see* Pet. Br. 1a-3a (statute); JA 156-57 (pertinent instructions)), and the constitutional power of States to serve their important interests in protecting the public in those situations is therefore not in question. The confinement at issue here is indefinite in theory and (for want of known curative treatments) perhaps in practice; and, as the evidence in this case indicates, psychiatric prediction that someone like Crane presents a near-term threat of serious harm is inherently uncertain. *See, e.g., Heller v. Doe by Doe*, 509 U.S. 312 (1993); *Addington v. Texas*, 441 U.S. 418, 429 (1979); APA *Amicus* Br. in *Hendricks* at 18.

The standard of dangerousness at issue here—generally (but imprecisely) predictable recidivism—does nothing to distinguish the class of sex predators covered by the Kansas statute from offenders generally. A very substantial number of offenders can be predicted to re-offend. For example, a large-scale 1989 study by the United States Department of Justice Bureau of Justice Statistics reported that, in a sample of more than 108,000 persons released from prisons in 1983, "an estimated 62.5% were rearrested for a felony or serious misdemeanor within 3 years, 46.8% were reconvicted, and 41.4% returned to prison or jail," and "22.7% of all prisoners were rearrested for a violent offense within 3 years of their

release." U.S. Dep't of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983* at 1 (April 1989). Dangerousness alone, in the sense of likely reoffense relevant here, thus furnishes no meaningful limiting principle, as Kansas seems to concede.

3. Nor is a meaningful limiting principle provided by adding the mere fact that the dangerousness flows from *some* diagnosis found in the *DSM* catalog. The Court concluded in *Hendricks* that constitutional justification cannot simply follow the *DSM*. And, as the APA there explained (*see* note 6, *supra*; *DSM-IV-TR* at xxxii-xxxiii; *id.* at xxxvii ("Cautionary Statement")), the *DSM* manual is designed for quite different purposes and expressly disclaims any intent to conform its diagnostic categories to legally relevant standards, much less to the circumstances of justified confinement.

More specifically, the presence of "antisocial personality disorder" as the condition causing the danger (*see DSM-IV-TR* at 701-706) provides no meaningful limiting principle. A very substantial number of offenders are diagnosable with antisocial personality disorder, whose "prevalence rates [are] as high as 40-60% among the male sentenced population." Moran, *The Epidemiology of Antisocial Personality Disorder*, 34 Soc. Psychiatry & Psychiatr. Epidemiol. 231, 234 (1999); JA 147 (noting deposition evidence from State's witness suggesting that 75% of prisoners have antisocial personality disorders). Under Kansas's theory, indefinite confinement would be available for a large share of the prison population based on this "chronic condition" (Moran, *supra*, at 234)—definitionally characterized by repeated disregard for the rights of others, including often by commission of offenses, intrinsically carrying a disposition to commit such acts, and not subject to known effective treatment. *See* JA 111, 112, 118 (difficult to change condition); *DSM-IV-TR* at 701-06; Meloy, "Antisocial Personality Disorder," in 2 G. Gabbard, *Treatments of Psychiatric Disorders* 2251-71 (3d ed. 2001).

This Court recognized and effectively rejected this result in *Foucha*, *supra*, which was relied on in *Hendricks* and, more recently, in *Seling v. Young*, 121 S. Ct. 727, 736 (2001), and in *Zadvydas*, 121 S. Ct. at 2498-99. In *Foucha*, the Court took as a given that the petitioner, at the time of the requested release, had been diagnosed by a doctor as having "an antisocial personality," a "disorder for which there is no effective treatment" (504 U.S. at 75, 82) but which has long been recognized as a psychiatric diagnosis.[9] Against that background, the Court made clear that it was a matter of constitutional principle that a person may be held based on his mental condition "as long as he is *both* mentally ill and dangerous, but no longer." 504 U.S. at 77 (emphasis added). Reiterating the insufficiency of dangerousness alone, the Court rejected, to the extent it understood Justice Kennedy in dissent to be advancing, "the proposition that a defendant convicted of a crime and sentenced to a term of years may nevertheless be held indefinitely because of the likelihood that he will commit other crimes." *Id.* at 76 n.4.

Having thus stressed the necessity for mental illness, the Court rejected the State's reliance on Foucha's "antisocial personality," coupled with dangerousness, as sufficient to perpetuate his confinement, apparently indefinitely. The most extensively explained reason was a matter of substantive due process: there was insufficient justification to overcome the basic principle that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Id.* at 80. Foucha, though concededly having a "disorder" (*id.* at 82), was not "mentally ill" within the meaning of, and so

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[9] *See DSM-IV-TR* at 701-06; *see also* Amer. Psych. Ass'n, *Diagnostic and Statistical Manual of Mental Disorders, Third Edition–Revised* 342-46 (1987); Amer. Psych. Ass'n, *Diagnostic and Statistical Manual of Mental Disorders, Third Edition* 317-21 (1980); Amer. Psych. Ass'n, *Diagnostic and Statistical Manual of Mental Disorders, Second Edition* 43 (1968).

could not be held pursuant to, the tradition justifying commitment of the mentally ill. *Id.* at 80. Accordingly, Foucha could be held only if he fit within the "narrow circumstances," reflected in *Salerno*, *supra*, where "limited confinement" is permitted *simply* to avert "a danger to others or to the community." 504 U.S. at 80; *see id.* at 83 ("'In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.'") (quoting *Salerno*, 481 U.S. at 755). Louisiana's statute failed to come within those narrow circumstances (504 U.S. at 82-83):

> [T]he State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.

4. a. A limiting principle underlies the tradition of civil commitment based on serious mental impairments, though it is not one Kansas has invoked here. That tradition historically rests in part on the State's police power, its basic power to protect the public—in this context, against the reality of certain dangerous individuals. Critically, though, putting aside the narrow class of the most certainly and acutely threatening individuals who might be locked up simply to protect the public—a class to which, as noted, Kansas has not in fact limited its confinement regime—the civil-commitment tradition has *also* required that the State be exercising its *parens patriae* power, *i.e.*, its power to act *in the interest of*

the individual by displacing his own judgments about hospitalization in certain circumstances. For cases like this one, therefore, as Kansas itself notes in describing *Addington*, involuntary commitment has traditionally required a determination that the individual "requires hospitalization *for his own welfare and* protection of others." Pet. Br. 17 n.4 (emphasis added). Mental illness has been a *distinctive* basis for detention of adults in our tradition precisely because (a) "[o]ne who is suffering from a debilitating mental illness" is not "wholly at liberty" (*Addington*, 441 U.S. at 429) and (b) the State is acting not for "the destruction of their liberties" but for a "beneficient function" (*Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 7 (1890)), furthering its "*parens patriae* interest in preserving and promoting the welfare of the [individual]" (*Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (*parens patriae* power regarding children)).

A *parens patriae* decision about confinement compares the probability of living freely without relapse (but with treatment) against commitment for the period likely in the individual's case, which might be indefinite in the case of a condition not known to be amenable to reliable treatment that would realistically lead to release. The historical tradition of mental-illness civil commitment has always required, where "dangerousness" means only the likely recidivism at issue here, a clear basis for concluding, making that comparison, that the confinement in a secure facility is better *for the individual* than the alternative. That comparison, of course, might more readily justify confinement in the first instance if the standards for release thereafter did not demand the kind of guarantee of "safe[ty]" Kansas seemingly demands (Kan. Stat. Ann. § 59-29a07), but were flexible and based on professional judgments assessing the appropriateness of continued confinement versus treatment in the outpatient settings in which the individual must learn to live without reoffending. *See* APA, *Dangerous Sex Offenders: A Task*

Force Report 62, 65, 68, 69, 73, 75 (1999) ["APA Task Force Report"] (importance of therapeutically monitored adjustment to real-world settings). Putting aside any cases of severe and incurable mental illness that itself undermines meaningful autonomy interests (and the cases of acute danger already noted), the essential requirement of a *parens patriae* confinement justified as in the individual's interest (after making the comparison of alternatives) is the actual availability of treatment holding realistic promise of release in a reasonable time. Any lesser standard for locking someone up unjustifiably overrides self-determination as the essential and defining premise of a free society. *See* APA *Amicus* Brief in *Hendricks* at 20-30; APA Task Force Report 171-75.[10]

Abandonment of a good-of-the-patient requirement in favor of a simple protection-of-the-public standard would not only transform commitment into general and open-ended preventive detention in circumstances where prediction is uncertain. It also would threaten the beneficial tradition of civil commitment itself. The ability of civil commitment to perform its function depends vitally on doctors making judgments *as doctors* for the benefit of their patients, with corresponding flexibility in making medical judgments about conditions and length of confinement and treatment. Turning doctors into jailers changes their role, undermining the therapeutic alliance with their patients that is basic to medicine generally and psychiatry in particular. *See* APA Task Force Report 173 ("[B]y bending civil commitment to serve essentially nonmedical purposes, sexual predator commitment statutes threaten to undermine the legitimacy of the medical model of commitment.").

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[10] The Court's decision in *Allen v. Illinois*, 478 U.S. 364 (1986), involved an individual who was severely "mentally ill" in the usual civil-commitment sense (*id.* at 366), requiring treatment for a psychosis, *i.e.*, schizophrenia. *See* APA *Amicus* Br. in *Hendricks* at 16 & n.12.

b. Kansas, relying on information presented in the brief of *amicus* Association for the Treatment of Sexual Abusers (ATSA), suggests (without quite arguing) the much broader view that the mere fact that some "treatment" is available for some sex offenders may justify confinement. *See* Pet. Br. 28-30. ATSA (at 9-10) describes the several types of treatment, including "cognitive-behavioral" therapies and pharmaceutical therapies, that may be provided to *some* individuals with sexual disorders. *See* APA *Amicus* Br. in *Hendricks* at 28-29 & n.26; APA Task Force Report 61-75, 103-20; General Accounting Office, *Sex Offender Treatment: Research Results Inconclusive About What Works to Reduce Recidivism* (1996). On the crucial matter of effectiveness, ATSA, after observing that "currently there is no 'cure' for sexual predation," makes only the carefully qualified summary of the literature: "Although treatment is still a developing field, recent research *suggests* that it *might* be *effective* for *high-risk* offenders." ATSA *Amicus* Br. 8 (emphases added).

The limitations in this statement are crucial to understanding how little is being asserted. ATSA's observations about "treatment" do not separate, among sex "offenders," those with a recognized mental illness (let alone a sex-related disorder) from those without (*e.g.*, there is no recognized mental illness of "rapism," *but cf.* Pet. Br. 23 n.10).[11] It does not indicate which subgroups have treatments available and which do not, even while ATSA notes that "[s]exual predators are far from a homogenous group." ATSA Br. 8.

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[11] "[A]lthough most sex offenders show traits of personality disorders and although there are subgroups representing the seriously mentally ill and developmentally disabled, most sex offenders do not show major psychiatric disorders. . . . Only the paraphilic diagnoses focus directly on psychopathological features of deviant sexual behavior, but these conditions appear to be absent in most offenders. In contrast, a significant number of sex offenders may have substance abuse or personality disorder diagnoses, but these conditions usually have little explanatory connection to the offender's sexual behavior." APA Task Force Report 7, 9.

And, in any event, it does not say what "effective" means, or whether treatments are "effective" when conducted in prison or prison-like settings, or whether any treatments are more than simply something a doctor or other professional might do to an individual hoping (with some basis) for some kind of "improvement," but actually hold significant potential to reduce the risk of recidivism to a level that would allow release.

For cases like the present, there is, in fact, no basis for identifying recidivism-reducing treatments or concluding that a State could provide "treatment" holding realistic promise of release. As one of ATSA's principal sources has written, "evaluators have had little success in determining whether sexual offenders have benefited from treatment"; and although the literature identifies some "useful direction on how to assess sexual offenders' long-term risk for recidivism[,] almost all of the documented risk factors . . . are static or extremely stable variables," so "[f]ew of the identified risk factors have even the potential for change, and, for those that can change, it is unclear whether reductions in the problem areas actually lead to reductions in recidivism," the net result being that "the available research can be used to justify committing sexual offenders, but it provides little direction as to when they can safely be released." Hanson, *What Do We Know About Sex Offender Risk Assessment?*, 4 Psychol., Pub. Policy & L. 50, 68 (1998); APA Task Force Report 175 ("to date there is no clear basis for making the claim that treatment of any class of patients with paraphilias will result in lower rates of recidivism"). ATSA itself does not assert that its members would consider involuntary hospitalization for such "treatment" to be medically (or professionally) justifiable. *See* APA Task Force Report 175 ("confinement without a reasonable prospect of beneficial treatment of the underlying disorder is nothing more than preventive detention and violates the norms of the medical model"). Kansas's statute, indeed, declares that it was

enacted to cover individuals for whom normal civil-commitment standards cannot be met. Kan. Stat. Ann. § 59-29a01; *see Hendricks*, 521 U.S. at 351.

Equally important, the evidence on "treatment" does nothing to distinguish "sexual predators" who might qualify under Kansas's statute from offenders generally. A recent Government-sponsored summary of the research literature indicates a comparable availability of "treatments" that might be effective in reducing recidivism among offenders, with no special limitation to sex offenders. MacKenzie, "Criminal Justice and Crime Prevention," in University of Maryland Department of Criminology and Criminal Justice, *Preventing Crime: What Works, What Doesn't, What's Promising* ch. 9 (U.S. Dep't of Justice Office of Justice Programs Research Report, a Report to Congress prepared for National Institute of Justice 1997).[12] Critically, then, not only does the

[12] The 1997 report (at page 9-16) states: "Today, while there is still some debate about the effectiveness of rehabilitation (e.g., Lab and Whitehead 1988; Whitehead and Lab 1989) recent literature reviews and meta-analyses demonstrate that rehabilitation programs can effectively change offenders (Andrews and Bonta 1994; Andrews, Bonta, and Hoge 1990; Andrews, Zinger, Hoge, Bonta, Gendreau, and Cullen 1990; Palmer 1975; Gendreau and Ross 1979, 1987). In general, according to Andrews et al. (1990), reviews of the literature show positive evidence of treatment effectiveness. For example, in a series of literature reviews, the proportion of studies reporting positive evidence of treatment effectiveness varied from near 50 percent to 86 percent: 75 percent (Kirby 1954), 59 percent (Bailey 1966), 50 percent (Logan 1972), 48 percent (Palmer's 1975 retabulation of studies reviewed by Martinson in 1974), 86 percent (Gendreau and Ross 1979) and 47 percent (Lab and Whitehead 1988). In reviewing these studies, Andrews *et al.* (1990) conclude that 'This pattern of results strongly supports exploration of the idea that some service programs are working with at least some offenders under some circumstances.' The important issue is not whether something works but what works for whom." The report summarizes (at page 9-49): "There is now substantial evidence that rehabilitation programs work. There is a body of research supporting the conclusion that some treatment programs work with at least some offenders in some situations.".

evidence on "treatment" fail to bring this statute within the paternalistic justification for traditional justifiable civil commitment but also fails to supply a limiting principle that would make upholding the confinement here stop short of generally authorizing preventive detention of offenders.

5. *Hendricks* itself involved a combination of two factors that together form a limiting principle: (a) a highly objective and near-certain prediction of imminent danger (b) based on inability to exercise self-control. Those factors, in *Hendricks*, inhered in a single fact, namely, Hendricks's own testimony of his inability to stop himself from re-offending. By virtue of that fact, Hendricks was analogous to the highly contagious individual—presenting an "imminent danger" according to "high medical authority" and not through voluntary human action—whose quarantine (at least temporarily) might be justified. *Jacobson*, 197 U.S. at 29, 30 (upholding mandatory vaccination); *see Hendricks*, 521 U.S. at 357; *id.* at 366 (citing *Compagnie Francaise*, *supra*).

The State, in the trial court, successfully resisted the incorporation of this limiting principle into the standards to be applied to Crane. In this Court, the State denies that *Hendricks* actually relied on such a limiting principle, but that denial, as explained above, cannot easily be squared with the *Hendricks* opinion. Moreover, the State's substantive argument against the *Hendricks* standard does not withstand scrutiny.

Citing quotations included in the APA's *amicus* brief in *Hendricks*, the State stresses that there may be no scientifically valid way to "'measur[e]'" or "'calibrat[e]'" degrees of volitional control or even to locate a clear "'line'" on one side of which are precisely those with such control and on the other those without. *See* APA *Amicus* Br. in *Hendricks* at 25-26 n.22, quoted at Pet. Br. 26, 28; *see also* ATSA *Amicus* Br. 3-7. Those imprecisions, in the APA's view, remain characteristic of the notion of volitional control

today. Indeed, the APA (like others) has relied on them to justify a policy choice to abandon the use of the concept for various legal purposes in favor of other standards, as with the insanity defense. As a simple logical matter, however, the inability to make the notion operationally precise across the full range of human behavior does not mean that the idea of volitional control lacks a coherent ordinary meaning or that some version of it cannot reasonably be used in law at all or that there are not clear cases at the ends of the spectrum, any more than that "day" and "night" are meaningless or useless or indistinguishable concepts simply because light fades gradually at twilight and dusk.

The Court's opinion in *Hendricks* itself establishes both the common-sense coherence and the actual use of the notion of volitional control, a concept on which the Court relied numerous times. *See* pages 11-15, *supra*. The dissent, too, used the notion. 521 U.S. at 375-76 ("inability to control his actions"; "irresistible impulse"). The notion of impaired capacity to control conduct, moreover, was incorporated into the once widely accepted formulation of the insanity defense in the 1962 Model Penal Code § 4.01: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he *lacks substantial capacity* either to appreciate the criminality [wrongfulness] of his conduct or *to conform his conduct to the requirements of the law*." (Emphasis added). Although that test has been altered in many jurisdictions, based in part on the difficulties of plenary use of volitional control,[13] that policy choice does

[13] The APA stated in 1982: "Many psychiatrists . . . believe that psychiatric information relevant to determining whether a defendant understood the nature of his act, and whether he appreciated its wrongfulness, is more reliable and has a stronger scientific basis than, for example, does psychiatric information relevant to whether a defendant was able to control his behavior. The line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk. . . . The concept of volition is the subject of some

not imply or prove the incoherence of the concept or its uselessness in any limited version.[14]

On the other hand, the very imprecisions of measuring degrees of volitional control do suggest that the idea cannot be fairly used to attach (profound) legal consequences unless the standard is set near the far end of the spectrum. As Kansas now insists, it is in the wide middle range of non-extreme cases that volitional "impairment" would present substantial problems of consistent, workable, objective application. Kansas does not suggest that a standard infected by such difficulties could, along with no more than likely recidivism, constitutionally be used to lock someone up indefinitely.

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disagreement among psychiatrists. Many psychiatrists therefore believe that psychiatric testimony (particularly that of a conclusory nature) about volition is more likely to produce confusion for jurors than is psychiatric testimony relevant to a defendant's appreciation or understanding." *American Psychiatric Association Statement on the Insanity Defense*, 140 Am. J. Psychiatry 681, 685 (1983) (emphasis added).

The APA further explained that reliance for an insanity defense on "'personality disorders' such as antisocial personality disorder (sociopathy) does not accord with modern psychiatric knowledge or psychiatric beliefs concerning the extent to which such persons do have *control over their behavior*." *Id.* (emphasis added). The APA, recommending a requirement of serious mental disorder of the severity of a psychosis and exclusive focus on ability to appreciate the wrongfulness of the conduct, added: "In practice there is considerable overlap between a psychotic person's defective understanding or appreciation and his ability to control his behavior. Most psychotic persons who fail a volitional test for insanity will also fail a cognitive-type test when such a test is applied to their behavior, thus rendering the volitional test superfluous in judging them." *Id.* at 685.

[14] *Amicus* ATSA (at 7) seems to suggest that its position is that an individual's "desires, thoughts, and feelings" are "inaccessible" in any sense relevant to the law. It is unclear what, under that position, would be left of the narrowed insanity defense, let alone ordinary civil commitment processes (or of "intent" throughout the law).

This Court in *Hendricks* carefully avoided those problems—without denying the difficulties of fine-tuning the volitional-control notion for general use, despite citing the page of the APA brief making the point (521 U.S. at 360 (citing APA *Amicus* Br. 26))—by repeatedly invoking not just some impairment but actual "inability to control," as proved to a high degree of certainty by Hendricks's own admission. *See* pages 11-15, *supra*; *see also* 521 U.S. at 375 (Breyer, J., dissenting) ("highly unusual inability to control his actions") (the portion of the dissent stating the area of agreement with the majority). That formulation reflects a key precedent relied on in *Hendricks* (521 U.S. at 358), namely, the 1940 *Pearson* case. The law upheld there applied only if the person was so severely impaired as to be rendered "'irresponsible for his conduct with respect to sexual matters'" by his mental condition (309 U.S. at 272), and this Court pointedly premised its constitutional ruling on its acceptance of the Minnesota Supreme Court's "construction" of the law as applying only to a category of "'persons who, by an habitual course of misconduct in sexual matters, ha[d] evidenced *an utter lack of power to control* their sexual impulses," causing them to be "likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their *uncontrolled and uncontrollable* desire.'" 309 U.S. at 273 (emphasis added); *see id.* at 274 (again stressing these requirements). Thus, *Hendricks* and *Pearson*, together with the need to avoid the difficulties that (as Kansas recognizes) afflict lesser versions of a "volitional impairment" standard, support a limiting principle of such severe impairment as to avoid the large gray area: inability to control the conduct, as proved with a high degree of certainty. Crane's confinement was not based on this or any other meaningful limiting principle.

CONCLUSION

The judgment of the Supreme Court of Kansas should be affirmed.

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IN THE
Supreme Court of the United States

STATE OF KANSAS, *Petitioner,*

v.

MICHAEL T. CRANE, *Respondent.*

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF KANSAS

BRIEF OF WASHINGTON LEGAL FOUNDATION, U.S. REPS. TODD TIAHRT AND JIM RYUN, ALLIED EDUCATIONAL FOUNDATION, THE STEPHANIE ROPER COMMITTEE AND THE STEPHANIE ROPER FOUNDATION, AND THE MARYLAND COALITION AGAINST CRIME AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the Kansas Sexually Violent Predator Act, Kan. Stat. Ann. § 59-29a01 *et seq.* -- which provides for the civil commitment and long-term care and treatment of sex offenders who are found beyond a reasonable doubt both (1) to be suffering from a mental abnormality or personality disorder; and (2) to present a continuing danger to soeiety through a likelihood of committing future sexually violent offenses -- violate substantive due process principles?

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Miscellaneous:

Roxanne Lieb and Scott Matson, "Sexual Predator Commitment Laws in the United States: 1998 Update," Washington State Insitute for Public Policy (Sept. 1998) 15

INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] While WLF engages in litigation and administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to criminal justice reform and crime victims' rights. In particular, WLF has appeared before this Court as well as other federal and state courts in numerous cases involving the rights of society to incarcerate dangerous individuals in order to protect public safety. *See, e.g., Ashcroft v. Ma,* No. 00-38 (U.S., argued Feb. 21, 2001); *Zadvydas v. Underdown,* No. 99-7791 (U.S., argued Feb. 21, 2001); *Kansas v. Hendricks,* 521 U.S. 346 (1997).

U.S. Representatives Todd Tiahrt and Jim Ryun are Members of Congress from Kansas. They support the right of Kansas to take appropriate measures to protect its citizens from the actions of sexually violent predators.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

The Stephanie Roper Committee, Inc. and the Stephanie Roper Foundation are nonprofit organizations based in Upper

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

Marlboro, Maryland. The Committee and Foundation were founded in 1982 by Roberta Roper, the mother of Stephanie, who was brutally kidnapped, raped, tortured, and murdered. The Committee has worked for the adoption of victim rights legislation, both at the state and federal levels. The Committee and Foundation (which has more than 11,000 members in all 50 states) provide a broad array of services to crime victims.

The Maryland Coalition Against Crime is based in Baltimore, Maryland and works for enactment of legislation that promotes tougher law enforcement measures and the rights of crime victims. It devoted considerable resources toward adoption of the "Victims' Rights Amendment" to the Maryland Constitution.

Amici are deeply concerned by the level of sexually oriented violent crime being committed in our society. Statistics indicate that those committing such crimes tend to be repeat offenders who have demonstrated an inability to control their antisocial behavior. *Amici* believe that the only way to protect the general public from such crimes is to incapacitate those shown highly likely to commit such crimes until they can be taught to conform their conduct to societal norms.

Amici submit this brief in support of Petitioner with the written consent of both parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby adopt by reference the Statement of the Case contained in Petitioner's brief.

In brief, Respondent Michael T. Crane has been convicted on two occasions of crimes involving sexual predation. He was convicted of lewd and lascivious behavior after exposing himself to a tanning salon attendant. *State v. Crane,* 260 Kan. 208, 918 P.2d 1256 (1996). He was also convicted of aggravated sexual battery after attacking a video store clerk, exposing his genitals to her, attempting to force her to perform oral sex, and threatening to rape her. Petition Appendix ("Pet. App.") 3a.

The Kansas legislature adopted in 1994 the Kansas Sexually Violent Predator Act (the "Act"), Kan. Stat. Ann. § 59-29a01, *et seq.*, to address the public safety problems caused by recidivist sexual offenders. The Act provides for the incapacitation and treatment (with a goal of eventual release) of anyone found to be a "sexually violent predator." The Act defines a "sexually violent predator" as anyone who:

(1) has been "convicted or charged with a sexually violent offense"; and

(2) "suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence."

K.S.A. § 59-29a02(a). At least one of the crimes of which Mr. Crane has been convicted, aggravated sexual battery, is

included within the Act's definition of "sexually violent offense." K.S.A. § 21-3503. The Act includes numerous procedural safeguards for those subject to its terms, including the right to counsel during any commitment proceedings, the right to a jury trial, and a prohibition against incapacitation unless the person subject to the law is found "beyond a reasonable doubt" to be a "sexually violent predator." Pet. App. 7a-8a.

Those incapacitated under the Act have the right to treatment of their mental abnormality/personality disorder and to release as soon as their mental condition "has so changed that the person is safe to be at large." K.S.A. § 59-29a07. Continued incapacitation is subject to mandatory annual review; if the court conducting the review determines that probable cause exists that the incapacitated person "will not engage in acts of sexual violence if discharged," the person is entitled to a hearing with the full panoply of procedural protections that were in place for the initial hearing. K.S.A. § 59-29a08.

Near the end of the four-year prison term that Mr. Crane was serving for his aggravated sexual battery conviction, Kansas brought proceedings against him under the Act, seeking to have him adjudicated a "sexually violent predator." Pet. App. 3a. At the August 1998 incapacitation trial, several psychologists called as witnesses by Kansas testified that Mr. Crane suffered from two personality disorders -- antisocial personality disorder and exhibitionism -- and that those disorders made it likely that if released, he would engage in predatory acts of sexual violence. *Id.* at 3a-4a.

Mr. Crane introduced no evidence in his own behalf. *Id.* at 25a. At the conclusion of Kansas's case, he moved for a directed verdict, asserting that Kansas had failed to introduce any evidence of lack of "volitional control"; *i.e.*, evidence that a mental defect rendered him unable to control his violent behavior. *Id.* The trial judge denied the motion, *id.*; he instructed the jury that in order to establish that Mr. Crane was a sexually violent predator, Kansas had to prove beyond a reasonable doubt that: (1) Mr. Crane had been convicted of aggravated sexual battery; and (2) he "suffers from a mental abnormality or personality disorder which makes the respondent likely to engage in future predatory acts of sexual violence, if not confined to a secure facility." *Id.* at 6a. The judge denied Mr. Crane's request that he instruct the jury that Kansas bore the burden of demonstrating that Mr. Crane could not control his dangerous behavior. *Id.* at 25a. The jury returned a unanimous verdict that Mr. Crane was, beyond a reasonable doubt, a sexually violent predator, and the judge ordered Mr. Crane committed to State custody for "control, care and treatment." *Id.*

The Kansas Supreme Court reversed and remanded for a new trial. *Id.* at 1a-20a. The court held that Mr. Crane's civil incarceration violated his "substantive" right under the Fourteenth Amendment's Due Process Clause to be free from unwarranted restraints on personal liberty. *Id.* at 11a-12a. The court noted that this Court had considered and rejected a substantive due process challenge to the Act in *Kansas v. Hendricks*, 521 U.S. 346 (1977). The court interpreted *Hendricks* as reading into the Act a requirement that individuals could not be held under the Act unless they were shown incapable of controlling their sexually predatory

behavior, and as holding that a civil detention law would violate substantive due process in the absence of such a requirement. *Id.* at 11a. Accordingly, the court stated, the trial court erred in failing to instruct the jury regarding that requirement. *Id.* at 12a.[2]

The court went on to reject Mr. Crane's other constitutional claims. The court held that Mr. Crane's incarceration violated neither the Double Jeopardy Clause nor the Ex Post Facto Clauses, because those provisions apply only to penal statutes and the Act is civil in nature. *Id.* at 12a-16a. Mr. Crane has not sought review of those holdings in this Court. Thus, the only issue before the Court is Kansas's challenge to the Kansas Supreme Court's holding that substantive due process precludes the civil commitment of those whose mental defect makes them likely to engage in predatory acts of sexual violence, in the absence of a explicit finding that the defendant cannot control his dangerous behavior.

SUMMARY OF ARGUMENT

Individual liberty is a value deeply rooted in American society. Nonetheless, society has regularly countenanced significant restraints on individual liberty where its interests in imposing such restraints have been deemed sufficiently weighty. Given that protecting citizens from crime is one of the most important functions of government, there could be little justification for prohibiting governments from imposing reasonable restraints on individual liberty, including

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[2] The court noted that there was evidence upon which the jury could have found that Mr. Crane's mental disorder rendered him incapable of controlling his dangerous behavior. *Id.*

detention of those who pose the greatest threats to public safety, in order to carry out that function.

Amici recognize that preventive detention laws pose a serious threat to individual liberty unless carefully circumscribed. *Amici* do not support the right of a State to incapacitate an individual indefinitely based solely on ill-defined fears that the individual might break the law in the future. Nonetheless, such laws are permissible provided: (1) they are limited to cases in which the legislature has a strong basis for predicting the detainee's dangerousness; (2) they are not designed to punish past misbehavior; and (3) the detention is subject to mandatory periodic review.

The Kansas Sexually Violent Predator Act meets all of those requirements. The Act does not mandate preventive detention for all dangerous individuals, only for those who are highly likely to commit violent sex crimes -- a crime which the Kansas legislature has found to be subject to very high recidivism. The Act ensures that only the most dangerous individuals are detained, by limiting potential detainees to those who: (1) have been convicted or charged with a sexually violent offense; and (2) suffer from either a "mental abnormality or personality disorder" which makes them likely to commit sex crimes. Nothing in the Act suggests an intent to punish individuals for past misconduct; the Act speaks only of a desire to prevent future crime, and Mr. Crane has produced no evidence suggesting a basis for doubting Kansas's good faith on that score. Finally, the duration of detention under the Act is strictly limited; those detained must be released as soon as they are "safe to be at large," and in no event may they be held for more than one

year unless a judge has reviewed their situations and found them to be continued threats to public safety.

In *Kansas v. Hendricks*, 521 U.S. 346 (1997), the Court upheld Kansas's use of the Act to impose civil detention on a man who was found likely to commit predatory acts of sexual violence unless detained. Eight members of the Court rejected the man's claim that detention violated his due process liberty interests. Nearly identical findings have been made with respect to Mr. Crane. *Hendricks* cannot meaningfully be distinguished and mandates a finding that Mr. Crane's substantive due process claims should be similarly rejected. The Kansas Supreme Court misinterpreted *Hendricks* by reading into it a prohibition against civil detention in the absence of an explicit finding that the detainee cannot control his dangerous behavior. *Hendricks* imposed no such prohibition; indeed, the Court upheld the detention of the defendant in that case even though the jury was never instructed that detention could be imposed only on those incapable of controlling their own behavior. *Hendricks* mandated no more than that the State demonstrate that the detainee's mental problem is what causes him to be likely to engage in dangerous activity. Because Kansas met that standard in this case, it has complied fully with the Due Process Clause.

ARGUMENT

I. DANGEROUS INDIVIDUALS DO NOT POSSESS A SUBSTANTIVE DUE PROCESS RIGHT TO BE FREE FROM PREVENTIVE DETENTION OF LIMITED DURATION

The Due Process Clause of the Fourteenth Amendment provides that "No State shall . . . deprive any person of life, liberty, or property without due process of law." In general, that clause has been understood to require *procedural* fairness before the government may take an action depriving a person of life, liberty, or property. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

But the Court has recognized that the Due Process Clause also includes a categorical prohibition against certain extreme forms of government conduct that result in deprivation of life, liberty, or property. This categorical prohibition, generally referred to as "substantive due process," "prevents the government from engaging in conduct that 'shocks the conscience' . . . or interferes with rights 'implicit in the concept of ordered liberty.'" *United States v. Salerno*, 481 U.S. 739, 746 (1987)(quoting *Rochin v. California*, 342 U.S. 165, 172 (1952), and *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937)). *Amici* submit that there is nothing "shock[ing to] the conscience" about a law that permits a state to protect its citizens by imposing finite periods of detention on those who have been found beyond a reasonable doubt to be highly likely to commit sexually violent crimes if not detained. The average citizen expects protection from all such individuals, regardless whether those

being detained are wholly incapable of controlling their impulses to engage in such violent crimes.

Amici recognize that individual liberty is a value deeply rooted in American society. Nonetheless, the federal and state governments have regularly countenanced significant restraints on individual liberty where society's interests in imposing such restraints have been deemed sufficiently weighty. No one seriously questions, for example, that government may constitutionally incarcerate those found to have violated the criminal laws, or that government has broad discretion to define what constitutes criminal conduct.

In the civil context as well, the Court has regularly upheld the government's power to require the sacrifice of individual liberty for the sake of the common good. For example, in *Arver v. United States,* 245 U.S. 366 (1918), the Court rejected claims that conscription into the armed forces violated substantive due process, even in times of war. The Court has also upheld compelled vaccinations designed to promote the public health, despite objections that vaccinations can result in permanent injury and death. *Jacobson v. Massachusetts,* 197 U.S. 11 (1905). The Court explained:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.

Id. at 26.[3] *Jacobson* also recognized the right of government to hold citizens in quarantine against their will in order to prevent the spread of disease. *Id.* at 29. *See also O'Connor v. Donaldson,* 422 U.S. 563, 582-583 (1975) (Burger, C.J., concurring)("There can be little doubt that in the exercise of its police powers a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease.").

Given that protecting citizens from crime is one of the most important functions of government, there could be little justification for prohibiting governments from imposing reasonable restraints on individual liberty in order to carry out that function. As the Court has recognized in *Schall v. Martin,* 467 U.S. 253 (1984), "The 'legitimate and *compelling* state interest' in protecting the community from crime cannot be doubted." *Schall,* 467 U.S. at 264 (quoting *De Veau v. Brainsted,* 363 U.S. 144, 155 (1960))(emphasis added). *Schall* rejected a substantive due process challenge to a New York law that permitted pre-trial detention of those charged with juvenile offenses.

The Court has recognized that determining how far government may go in sacrificing individual liberty in pursuit of the common good entails a balancing process:

> In determining whether a substantive right protected by the Due Process Clause has been violated, it is neces-

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[3] In reaffirming in *Hendricks* that "an individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context," the Court cited approvingly to the quoted passage from *Jacobson*. *Hendricks,* 521 U.S. at 356-57.

> sary to balance "the liberty of the individual" and the "demands of organized society." *Poe v. Ullman,* 367 U.S. 497, 542 (1961)(Harlan, J., dissenting). In seeking this balance in other cases, the Court has weighed the individual's interest in liberty against the State's asserted reasons for restraining individual liberty.

Youngberg v. Romeo, 457 U.S. 307, 320 (1982).

This balancing process was played out in detail in *Salerno,* in which the Court upheld pretrial detention of those charged with serious federal crimes as a means of preventing them from committing additional crimes. Among the factors cited by the Court as tipping the balance in favor of upholding the pretrial detention law were: (1) the detention was limited in duration -- it could not continue beyond trial; (2) only those charged with particularly serious crimes could be held; and (3) the government was required to show that the detainee presented a demonstrable danger to the community and that no conditions of release would reasonably assure community safety. *Salerno,* 481 U.S. at 750. The Court noted:

> There is no doubt that preventing danger to the community is a legitimate regulatory goal. . . . We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest.

Id. at 747-748.[4]

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[4] Among the cases cited by the Court for that proposition were (continued...)

Each of the three factors cited by *Salerno* as tipping the balance in favor of civil detention in that case are present in this case. First, no one may be indefinitely committed under the Act. Rather, one year is the maximum amount of time that an individual can be forced to remain incapacitated pursuant to a single judicial proceeding. If Kansas wishes to continue the detention beyond one year, the presiding judge must determine that there is *no probable cause* to believe that the detainee no longer presents a danger, or the finder of fact must again determine *beyond a reasonable doubt* that the detainee is a sexually violent predator. Moreover, the detainee is entitled to immediate release under the Act if, at any time, (s)he is adjudged "safe to be at large." K.S.A. § 59-29a07.

Second, the Act is limited to a very small class of dangerous individuals: those who are likely to commit violent sex crimes. The Kansas legislature has not engaged in a blunderbuss effort to sweep all potential undesirables from the streets; rather, it has focused its attention on a particularly destructive type of violent crime and on a group the legislature has found to be particularly prone to recidivism. As the Court recognized in *Schall*, the government's interest in preventive detention is particularly strong

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[4](...continued)
Ludecke v. Watkins, 335 U.S. 160 (1948)(approving unreviewable executive power to detain enemy aliens in time of war); *Moyer v. Peabody,* 212 U.S. 78, 84-85 (1909)(rejecting due process claim of individual jailed without probable cause by Governor in time of insurrection); and *Carlson v. Landon,* 342 U.S. 524, 537-542 (1952) (detention of potentially dangerous resident aliens pending deportation proceedings). *Salerno,* 481 U.S. at 748.

when those being detained are part of a group with high rates of recidivism. *Schall,* 467 U.S. at 265.

Third, the Act limits civil detention to those few for whom an extremely strong showing of dangerousness can be made. The Act's "beyond a reasonable doubt" standard of proof (a much stricter standard than the "clear and convincing evidence" standard often used in commitment statutes) significantly limits the group of dangerous individuals who can be made subject to the Act. Moreover, the Act requires significantly more than evidence of past bad acts in order to prove a likelihood of future misconduct. Kansas must also demonstrate that the propensity to commit violent sex crimes is based on a "mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." K.S.A. § 59-29a02(a). Tying the finding of future dangerousness to medical evidence regarding the detainee's mental condition significantly improves the precision of the dangerousness prediction at the same time that it restricts the pool of those subject to detention.[5] As the Court noted in rejecting a previous challenge to the Act, "The numerous procedural and

[5] By pointing approvingly to the "mental abnormality or personality disorder" requirement, *amici* do not mean to suggest that some type of mental defect need be demonstrated in order to justify civil detention of those deemed dangerous. Rather, *amici* view that requirement as simply one method by which a state can tip the constitutional balance in favor of a preventive detention measure, both by narrowing the potential for intrusion on individual liberty and by increasing the likelihood that detention will actually promote public safety. Cases such as *Salerno* and *Jacobson* refute any suggestion that the Constitution limits civil detention of dangerous individuals to those whose dangerousness is caused by a mental defect.

evidentiary protections afforded here demonstrate that the Kansas legislature has taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards." *Hendricks,* 521 U.S. at 364.

Indeed, the experience in Kansas and other States indicates that civil detention laws for sexual predators have been applied sparingly, and that only a small minority of those identified by State authorities as meeting the statutory criteria actually end up being subject to detention. For example, a recent study examined implementation of detention laws in 11 States (including Kansas) through the summer of 1998. The study determined that while more than 2,200 sex offenders had been referred for possible detention, only 422 were actually ordered detained. Roxanne Lieb and Scott Matson, "Sexual Predator Commitment Laws in the United States: 1998 Update," Washington State Institute for Public Policy (Sept. 1998) at 10 (available at www.wa.gov/wsipp). When civil detention proceedings went all the way to trial, the jury decided against detention in a majority of cases. *Id.* Those figures indicate that the procedural and evidentiary protections for defendants that Kansas and other States have built into their sexual predator commitment statutes have been successful in ensuring that the statutes are not applied indiscriminately and that detention is being limited to only the most dangerous of sexual predators.

Amici recognize that no prediction of future dangerousness can be 100% accurate. But as the Court has recognized, the potential imprecision of such predictions is not grounds for prohibiting all government action. For example, while recognizing uncertainty among psychiatrists

regarding whether a mentally ill person who has committed a criminal act is likely to commit additional criminal acts (and thus whether the person should be civilly committed based on dangerousness), the Court in *Jones v. United States,* 463 U.S. 354 (1983), rejected claims that such uncertainty prohibits legislatures from addressing the issue:

> We do not agree with the suggestion that Congress' power to legislate in this area depends on the research conducted by the psychiatric community. We have recognized repeatedly the "uncertainty of diagnosis in this field and the tentativeness of professional judgment. The only thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment. . ." *Greenwood v. United States,* 350 U.S. 366, 375 (1956). . . . The lesson we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments.

Jones, 463 U.S. at 364 n.13. *See also Hendricks,* 521 U.S. at 358 ("[F]rom a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct.") (quoting *Schall,* 467 U.S. at 278).

While reducing danger to society at large is the touchstone of civil detention, *amici* do not mean to suggest that a demonstration of future dangerousness should ever, by itself, be sufficient to justify civil detention. To the contrary, as *Hendricks* explained, "A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment."

Hendricks, 521 U.S. at 358. Rather, proof of dangerousness must be combined with "proof of some additional factor." *Id.* But while proof that the detainee's dangerousness is the product of some sort of mental defect can serve as the mandatory "additional factor" (*id.*),[6] the Court has never suggested that it is the *only* "additional factor" that can serve to justify civil detention. Such a rule would make no sense; it would suggest that individuals whose dangerousness is caused by a mental defect deserve to be treated more harshly than equally dangerous individuals who are of sound mind but nonetheless habitually choose to commit violent crimes.

The reason that the Court has required "proof of some additional factor" is not a desire to discriminate against those suffering mental health problems, but a fear that government power to detain dangerous individuals, if left unchecked, would be subject to considerable abuse. A government bent on suppressing dissent might be able to manufacturer evidence that its political opponents are "dangerous" and thus subject to indefinite detention. By requiring "proof of some additional factor," the Court is ensuring that preventive detention statutes can never be applied indiscriminately to a broad range of citizens. But so long as state law sufficiently cabins the discretion of public safety officials by mandating both that civil detainees pose a threat to public safety *and* that there is some "additional factor" that strictly limits the pool of potential detainees, the likelihood of abuse of detention powers is significantly reduced. Under those circumstances, civil detention does not violate the Due Process Clause, regardless whether the detainee suffers from a mental defect.

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[6] Indeed, Kansas amply demonstrated that Mr. Crane's dangerousness was the product of his personality disorder.

As noted above, Kansas officials have chosen to detain Mr. Crane only after determining that he falls within a narrow class of particularly dangerous individuals. That determination, when combined with the strict procedural standards mandated under the Act, was more than sufficient to justify Mr. Crane's detention; that Kansas also demonstrated that Mr. Crane's dangerousness was the product of a mental defect (an antisocial personality disorder) was simply icing on the cake.

In sum, Mr. Crane has failed to demonstrate that Kansas's curtailment of his individual liberty under the facts of this case "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Salerno,* 481 U.S. at 751 (quoting *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934)), or otherwise "shocks the conscience," *id.* at 746; accordingly, his continued detention does not violate his substantive due process rights.[7]

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[7] The Court has stated that "evidence that a practice is followed by a large number of states . . . is plainly worth considering in determining whether the practice" offends basic principles of justice and thus violates substantive due process. *Schall,* 467 U.S. at 268. It is worth noting, therefore, that laws prescribing civil commitment for sex offenders have a lengthy pedigree in this country. By 1960 at least 26 states had adopted some form of civil commitment law for sex offenders. The Court rejected a due process challenge to one such law, in *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940). A number of states have in recent years adopted laws substantially similar to the Kansas Sexually Violent Predator Act. *See, e.g., Seling v. Young,* 531 U.S. 250 (2001). It is difficult to believe that so many state legislatures would have adopted such laws if such laws objectively could be said to offend our nation's basic notions of justice.

II. THE STANDARD ADOPTED BY THE KANSAS SUPREME COURT WOULD REQUIRE COURTS TO MAKE PSYCHIATRIC DETERMINATIONS FOR WHICH THEY ARE ILL-EQUIPPED

The parties to this case disagree not so much about the facts of Mr. Crane's mental condition as they do about the legal significance to attach to his condition. The evidence at trial was uncontested that Mr. Crane suffers from a personality disorder (antisocial personality disorder combined with exhibitionism), and the jury found that his personality disorder made it likely that he would engage in future predatory acts of sexual violence unless he were detained in a secure facility. Antisocial personality disorder is a medical condition well-accepted within the medical community. Mr. Crane nonetheless contends (and the Kansas Supreme Court agreed) that his detention on the basis of that evidence violated substantive due process in the absence of an explicit finding that Mr. Crane is incapable of controlling his dangerous behavior.

That contention is without merit. *Hendricks* -- which upheld the civil detention of a convicted sex offender whose background cannot meaningfully be distinguished from Mr. Crane's -- and related decisions from this Court mandate a finding that Mr. Crane's detention does not violate his substantive due process rights. Indeed, efforts to distinguish *Hendricks* from this case would enmesh courts in detailed medical issues they are ill-equipped to resolve.

Mr. Crane's efforts to distinguish his situation from Mr. Hendricks's is reminiscent of Mr. Hendricks's efforts to distinguish *his* situation from that of individuals whose prior

detention had been upheld on the basis that their mental condition rendered them a danger to society. Mr. Hendricks admittedly suffered from a "mental abnormality" within the meaning of the Kansas law.[8] Citing *Foucha v. Louisiana*, 504 U.S. 71 (1992), and *Addington v. Texas*, 441 U.S. 418 (1979), Mr. Hendricks argued that a mere finding of a mental abnormality did not supply the "additional factor" required under substantive due process standards to justify civil detention. *Hendricks*, 521 U.S. at 359. Rather, he argued, *Foucha* and *Addington* required nothing less than a finding that the detainee suffered from a "mental illness." *Id.* at 358-59.

The Court rejected that argument on the ground that it had never mandated use of any particular nomenclature in connection with civil detention proceedings:

> Contrary to Hendricks' assertion, the term "mental illness" is devoid of any talismanic significance. Not only do "psychiatrists disagree widely and frequently on what constitutes a mental illness," *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985), but the Court itself has used a variety of expressions to describe the mental condition of those properly subject to civil confinement. *See, e.g., Addington, supra,* at 425-426 (using the terms

[8] A "mental abnormality" is defined under the Act as a "condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." K.S.A. § 59-29a02. The term "mental abnormality" is one coined by the Kansas legislature; unlike "personality disorder" (the mental condition ascribed to Mr. Crane), "mental abnormality" is not a term regularly used by the psychiatric community. *See Hendricks*, 521 U.S. at 359.

> "emotionally disturbed" and "mentally ill"); *Jackson v. Indiana*, 406 U.S. 715, 732, 737 (1972) (using the terms "incompetency" and "insanity"); cf. *Foucha*, 504 U.S., at 88 (O'CONNOR, J., concurring in part and concurring in judgment) (acknowledging State's authority to commit a person when there is "some medical justification for doing so").

Hendricks, 521 U.S. at 359. In connection with detention proceedings based on the defendant's mental condition, the Court deemed it sufficient for a State to demonstrate that there is a causal connection between the defendant's mental condition and the likelihood that he will engage in dangerous behavior. *Id.* at 359-60. The Court upheld civil detention under the Act of those (such as Mr. Hendricks) who suffered from a "mental abnormality," at least where the detainee's propensity for dangerous behavior was attributable to the mental abnormality and not to his wholly voluntary desire to commit violent crimes. *Id.*

Just as the Court rejected Mr. Hendricks's efforts to distinguish detention based on "mental illness" from detention based on a "mental abnormality," so too should the Court reject Mr. Crane's efforts to distinguish detention based on "mental abnormality" from detention based on "personality disorder." As *Hendricks* explained, there is no "talismanic significance" to the precise wording used to describe the mental condition of the defendant in a civil detention proceeding. *Id.* at 359.

To the extent that Mr. Crane argues that *Hendricks* is distinguishable because (unlike in this case) there was an explicit jury finding that Mr. Hendricks lacked volitional

control, he is in error. Under the Act, a defendant can be found to suffer from a "mental abnormality" (the mental condition ascribed to Mr. Hendricks) if the defendant has a "condition affecting the emotional *or* volitional capacity." K.S.A. § 59-29a02(b) (emphasis added). In other words, the jury could have ruled against Mr. Hendricks based on a finding of diminished "emotional capacity," without *explicitly* finding that he lacked "volitional capacity" to control his actions. But eight members of the Court nonetheless rejected Mr. Hendricks's substantive due process claim, presumably because they recognized that the statutory requirement that the mental abnormality be causally related to the defendant's dangerousness was sufficient to demonstrate that the defendant would have great difficulty trying to control his dangerous behavior. Similarly, although the jury was not explicitly instructed that Mr. Crane could not be confined unless he suffered from a volitional impairment, that was the practical effect of the judge's instruction that the jury should not find against Mr. Crane unless it found that his dangerousness was *caused* by his personality disorder. *See* Pet. App. 6a.

Moreover, efforts to attach constitutional significance to any distinction between Mr. Crane's and Mr. Hendricks's mental conditions would require the Court to delve far more deeply into the field of psychiatry than it has heretofore been willing to do. As the Court has recognized, "Psychiatry is not . . . an exact science." *Ake,* 470 U.S. at 81. Yet Mr. Crane is asking the Court to read into the Due Process Clause a distinction between a "mental abnormality" such as pedophilia (detention is constitutionally permissible) and a "personality disorder" such as antisocial personality disorder (detention is prohibited as a violation of substantive due

process). *Amici* respectfully suggest that given the imprecise nature of psychiatric diagnoses, there is no principled basis upon which the Court could make such distinctions.

In the past, the Court has expressed a willingness to defer to reasonable legislative judgments in this area. As the Court explained in *Jones,* "The lesson we have drawn [from the large degree of uncertainty in psychiatric diagnoses] is not that the government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments." *Jones,* 463 U.S. at 364 n.13. Kansas has determined that public safety demands that it be permitted to detain those past offenders whose mental condition makes it likely that they will engage in dangerous sexual behavior, regardless whether the mental condition is characterized as a "mental abnormality" or a "personality disorder." Kansas's decision to apply the Act to those (such as Mr. Crane) suffering from a personality disorder is reasonable, particularly because antisocial personality disorder is widely recognized within the psychiatric community as a disorder and Mr. Crane does not dispute his diagnosis. In the absence of evidence that Kansas is using the Act indiscriminately to detain large numbers of citizens, the Court ought to defer to that reasonable legislative decision.

III. THE DECISION BELOW WAS BASED ON A MISREADING OF HENDRICKS

The Court in *Hendricks* upheld the Act and ruled that Kansas had acted properly in imposing civil detention on Mr. Hendricks. Nonetheless, the Kansas Supreme Court in this case read *Hendricks* as far less than a ringing endorsement of

the Act; indeed, the Kansas court relied almost exclusively on *Hendricks* as the basis for its determination that Kansas's civil detention of Mr. Crane pursuant to the Act violated the Due Process Clause. The decision below was based on a serious misreading of *Hendricks*.

A. The Kansas Supreme Court Erroneously Concluded that *Hendricks* Did Not Uphold the Act as Written

As noted above (at 22-23), the Act does not preclude civil detention in the absence of an *explicit* finding that the defendant suffers a volitional impairment; *i.e.*, lacks the ability to control his dangerous behavior. The Court in *Hendricks* upheld civil detention of Mr. Hendricks despite the absence of a jury finding that he could not control his behavior. More importantly, the Court made clear that it was denying Mr. Hendricks's facial challenge to the Act and upholding it as written: "We hold that the Kansas Sexually Violent Predator Act comports with due process." *Hendricks*, 521 U.S. at 371.

Nonetheless, the Kansas Supreme Court interpreted *Hendricks* as holding that the Act was *not* constitutional as written. Rather, the Kansas court concluded, "[T]he Supreme Court read a requirement of inability to control behavior into the Act in order to uphold its constitutionality." Pet. App. 11a. Because Mr. Crane's jury did not make an explicit finding that Mr. Crane was incapable of controlling

his dangerous behavior, the court overturned the verdict directing that he be incapacitated.[9]

The Kansas court erred in concluding that *Hendricks*, in order to preserve the Act's constitutionality, read into the Act a requirement of an explicit finding that the defendant lacks volitional control. To the contrary, *Hendricks* is replete with statements indicating that the Act as written is facially valid. For example, after reviewing civil commitment statutes that had been upheld in previous cases, the Court concluded that the Act "is plainly of a kind with these other civil commitment statutes" and "consistent with the requirements of these other statutes *that we have upheld*." *Hendricks*, 521 U.S. at 358 (emphasis added). Moreover, although Kansas was detaining Mr. Hendricks based solely on the "mental abnormality" prong of the Act, numerous statements in the opinion indicated the Court's approval of the "personality disorder" prong of the Act as well. *See, e.g., id.* (The Act "requires a finding of future dangerousness, and then links that finding to the existence of a 'mental abnormality' or 'personality disorder.'").

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[9] The Kansas court apparently recognized that Mr. Hendricks's jury similarly had failed to make an explicit finding that Mr. Hendricks was unable to control his dangerous behavior. But the Kansas court indicated that this Court must have concluded that that failure was not fatal to the case against Mr. Hendricks because his lack of volitional control was not contested -- Mr. Hendricks had conceded in his trial testimony that "when he becomes 'stressed out,' he cannot 'control the urge' to molest children." *Id.* at 8a (quoting *Hendricks*, 521 U.S. at 360). In the view of the Kansas court, *Hendricks* did not "focus on the Act's constitutionality"; rather, according to the court, *Hendricks* focused solely on whether Kansas was acting constitutionally in detaining Mr. Hendricks. Pet. App. 10a.

The Kansas court's interpretation of *Hendricks* is doubly implausible because it assumes that a federal court read a missing term into a State statute for the purpose of providing a saving construction. The Court has repeatedly held that federal courts are not authorized to provide saving constructions to State statutes by narrowing their scope, unless the narrowing construction is reasonable and readily apparent; only a State court may do so. *See, e.g., Stenberg v. Carhart,* 530 U.S. 914, 944 (2000); *Grayned v. City of Rockford,* 408 U.S. 104, 110 (1973).

The Kansas court did not claim to be invoking its own authority to provide a narrowing construction; indeed, in its view, neither the "mental abnormality" prong nor the "personality disorder" prong of the Act requires Kansas to demonstrate lack of volitional control:

> Kansas's statutory scheme for commitment of sexually violent predators does not expressly prohibit confinement absent a finding of uncontrollable dangerousness. In fact, a fair reading of the statute gives the opposite impression.

Pet. App. 8a. Rather, the Kansas court interpreted the Act as requiring an explicit finding of inability to control behavior solely because it interpreted *Hendricks* as having read such a requirement into the Act. *Id.* at 11a. As explained above, that was a clear misreading of *Hendricks*. Not only did *Hendricks* not read additional terms into the Act, it denied Mr. Hendricks's facial challenge to the Act as written, holding that the Act "comports with due process requirements." *Hendricks,* 521 U.S. at 371.

B. Contrary to the Kansas Court's Understanding, *Hendricks* Held that the Act's Treatment of the "Volitional Impairment" Issue Satisfied All Substantive Due Process Concerns

Hendricks held that proof of dangerousness is insufficient by itself to justify indefinite detention; rather, the Court held, due process demands "proof of some additional factor." *Id.* at 358. The Court explained that one possible "additional factor" relates to individuals who possess some mental defect that makes it difficult for them to control their dangerous behavior. *Id.* at 357-58. The Court on at least five occasions made reference to the detention of individuals whose mental condition makes it either difficult or impossible for them to control their dangerous behavior. *Id.* at 357, 358, 360, 362, 364.

The Kansas court seized on those references to conclude that *Hendricks* had held that substantive due process prohibits detention of individuals under the Act absent a specific finding that "the defendant cannot control his dangerous behavior." Pet. App. 11a. Because Mr. Crane's jury had not been instructed to find in Mr. Crane's favor unless it found that he was unable to control his own behavior, the court invoked its interpretation of *Hendricks* to overturn the jury's verdict.

The Kansas court's conclusion is a serious misreading of *Hendricks*. Nowhere in its opinion did the Court indicate that due process prohibits civil detention in the absence of an *explicit* finding of volitional impairment. To the contrary, the entire thrust of *Hendricks* is that by limiting detention to those whose propensity to dangerous behavior is the product

of a mental impairment, Kansas had successfully limited the scope of detention to those who have great difficulty controlling their own behavior.[10] On at least three occasions in its decision the Court rejected challenges to the Act precisely because the Act's causation requirement ensured that detention would be limited to those who found it difficult if not impossible to control their dangerous behavior. *Hendricks,* 521 U.S. at 357 (The Act is "of a kind" with detention statutes previously upheld by the Court because "[i]t requires a finding of future dangerousness, and then links that finding to the existence of a 'mental abnormality' or 'personality disorder' *that makes it difficult, if not impossible, for the person to control his dangerous behavior.*") (emphasis added); *id.* ("The precommitment requirement of a 'mental abnormality' or 'personality disorder' is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness."); *id.* at 362 ("Those persons committed under the Act are by definition, suffering from a 'mental abnormality' or a 'personality disorder' that prevents them from exercising adequate control over their behavior."). *Hendricks* makes clear that the Act satisfies the Due Process Clause's volitional impairment component by requiring clear evidence of "a present mental condition that creates a likelihood of such [dangerous] conduct in the future if the person is not incapacitated," *id.* at 357, and does not

[10] The Court's conclusion is eminently sensible. One's mental impairments generally are not viewed as something one adopts as a matter of free will. Accordingly, actions that are caused or made more likely as a result of one's mental impairments should logically be deemed as actions over which one lacks volitional control.

suggest that Kansas must also obtain an explicit judicial finding of volitional impairment before it may invoke the Act.[11]

If the Kansas court really were correct that *Hendricks* held that "commitment under the Act is unconstitutional absent a finding that the defendant cannot control his own dangerous behavior," Pet. App. 11a, one would have expected the Court at least to comment on Kansas's detention of Mr. Hendricks in the absence of a jury finding that he could not control his dangerous behavior. The absence of such comment is strong evidence that *Hendricks* did not require any such explicit findings.

[11] In discussing the Act's "personality disorder" prong, the Kansas court stated, "[In the present case, Crane suffers from a 'personality disorder,' which by definition does not include a volitional impairment." Pet. App. 11a-12a. That statement refers to the absence in the Act of any definition of "personality disorder." The court was not suggesting that those who suffer from personality disorders engage in dangerous behavior solely as a matter of free will; indeed, the great weight of medical literature is to the contrary.

CONCLUSION

Amici curiae respectfully request that the Court reverse the judgment of the Kansas Supreme Court.

Respectfully submitted,

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